Supreme Court, U.S.
FILED

10-839 DEC 21 2010

OFFICE OF THE CLERK

No. _____

In The

Supreme Court Of The United States

♦

CLAUDIA SEGER THOMSCHITZ,
Petitioner

v.

SARAH BLODGETT DUNBAR,
Respondent

♦

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

♦

PETITION FOR WRIT OF CERTIORARI

♦

THOMAS J. HAMILTON*
Byrne Goldenberg & Hamilton, PLLC
1025 Connecticut Avenue, N.W.
Suite 1012
Washington, DC 20036
(202) 857-9775

STEPHEN H. MYERS*
600 Jefferson Street, Suite 401
Post Office Box 51222
Lafayette, LA 70505-1222
(337) 266-2225

**Counsel of Record* *Attorneys for Petitioner*

QUESTIONS PRESENTED

On June 30, 2009 at the close of the Prague Holocaust Era Assets Conference, the U.S. and 46 other "stakeholder" nations promulgated the "Terezin Declaration" (Declaration), a purposefully "non-binding" executive agreement prescribing how they would handle claims for the recovery of Nazi-confiscated assets. The stakeholders agreed "to make certain" that their discrete national "legal systems" resolved claims for the recovery of Nazi-confiscated artworks "based on the facts and merits of the claim," and that "Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art." The Declaration explicitly augmented a similar predecessor agreement in 1998 (the Washington Principles) by which at the instigation of the U.S. Government 44 nations undertook merely to decide claims for the recovery of Nazi-confiscated artworks in a "just and fair" manner.

1. Does U.S. foreign policy expressed in the Declaration that claims for the recovery of Nazi-confiscated artworks be resolved upon their substantive merits preempt – under the Supremacy Clause of the U.S. Constitution – state prescriptive periods governing the recovery of movable personal property within their borders that obstruct this objective when these periods reflect an exercise of the "'traditional competence'" of the several states within the meaning of *American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 420 n.11 (2003)?

2. Does the foreign policy commitment of the U.S. Government in the Declaration to "make certain" that its discrete national "legal system" resolves claims for the recovery of Nazi-confiscated artworks on their substantive merits (which policy enjoys the express approval of *both* Congress and the President) obligate the Federal Judiciary—as a coordinate branch of the U.S. Government—to implement this goal through federal common law if necessary?

LIST OF PARTIES

Petitioner Claudia Seger-Thomschitz (S-T) is an individual residing in Vienna, Austria.

Respondent Sarah Blodgett Dunbar (Dunbar) is an individual residing in New Orleans, Louisiana.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES iii

TABLE OF CONTENTS iv

TABLE OF APPENDICES vi

TABLE OF CITED AUTHORITIES viii

OPINIONS AND ORDERS BELOW 1

BASIS FOR JURISDICTION 1

CONSTITUTIONAL AND
STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING
THE PETITION 17

POINT I:
Dunbar Abandons the Analytical Framework That the Court Consistently Has Employed to Determine When the President Acts in Foreign Affairs in a Manner that Preempts Conflicting State Law—the "Tripartite" Scheme of Justice Jackson in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952)—Thereby Skewing the Court's Preemption Doctrine as well as Recent Foreign Affairs Decision 19

POINT II:
Dunbar Mistakes the Politically Brokered and Purposefully Non-Binding Language of the Declaration that the Stakeholders Agree that Their Discrete National Legal Systems Resolve Claims for the Recovery of Nazi-Confiscated Artworks on Their Substantive Merits with the Far More Emphatic Foreign Policy of Both Political Branches of the U.S. Government to Return Nazi-Confiscated Artworks to Rightful Owners Thereby Undermining—Correspondingly—U.S. Foreign Policy in Several Important Ways 31

POINT III:
Dunbar Ignores That as a Coordinate Branch of the U.S. Government the Federal Judiciary—in the Absence of Congressional Legislation Implementing the Declaration—Has an Affirmative Responsibility to "Make Certain" (as the Declaration Prescribes) that the U.S. National "Legal System" Resolves Judicial Claims for the Recovery of Nazi-Confiscated Artworks on Their Substantive Merits By Invoking Federal Common Law to Achieve This Objective 33

CONCLUSION 43

TABLE OF APPENDICES

Appendix A – Order of the United States Court of Appeals for the Fifth Circuit, filed August 20, 2010, affirming the ruling of the District Court A-1

Appendix B – Per Curiam Order of the United States Court of Appeals for the Fifth Circuit, filed on September 24, 2010, Denying Petition for Rehearing En Banc A-9

Appendix C – Article VI, Clause 2 of the United States Constitution (Supremacy Clause) A-11

Appendix D – Prague Holocaust Era Assets Conference: Terezin Declaration A-12

Appendix E – Washington Conference Principles on Nazi-Confiscated Art (Washington Principles) A-28

Appendix F – The Holocaust Victims Redress Act, Public Law No. 105-158, 112 Stat. 15 (February 13, 1998) A-30

Appendix G – 28 USCA § 2106 ..... A-37

Appendix H – La. Code Civ. Ann. Art. 3421 (1982) A-38

Appendix I – La. Civ. Code Ann. Art. 3488 (1982) A-39

Appendix J – La. Civ. Code Ann.
Art. 3491 (1982) A-40

Appendix K – La. Civ. Code Ann.
Art. 3506 (1979) A-41

Appendix L – La. Civ. Code Ann.
Art. 3544 (1991) A-44

Appendix M – Letter from Kunsthaus Zürich (Switzerland) Dated October 19, 2010 Invoking *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F. 3d 1 (1st Cir. 2010) to Deny Claim for the Return of Third Kokoschka Artwork that Nazi Victim Reichel Lost in Same Coercive Transaction as Painting at Issue in *Dunbar* A-46

TABLE OF CITED AUTHORITIES

FEDERAL CASES

Adler v. Taylor, 2005 WL 4648511
(C.D. Cal. 2005), aff'd *Orkin v. Taylor*,
487 F.3d 734 (9th Cir. 2007) 6

American Insurance Ass'n v. Garamendi,
539 U.S. 396 (2003) ..... *passim*

Banco Nacional de Cuba v. Sabbatino,
376 U.S. 398 (1964) 38, 39, 40

*Bernstein v. N.V. Neerlandsche-
Amerikannsche, Stoomvaart-Maatschappij*,
210 F.2d. 375 (2d. Cir. 1954) 3

Dames & Moore v. Regan,
453 U.S. 654 (1981) 19, 20, 26

Dunbar v. Seger-Thomschitz,
638 F. Supp.2d 659 (E.D.La.),
aff'd 615 F.3d 574 (5th Cir. 2010) ..... *passim*

Erie R. Co. v. Tompkins,
304 U.S. 64 (1938) 39

Felder v. Casey,
487 U.S. 131 (1988) 25

*Hillsborough County, Florida v.
Automated Medical Laboratories, Inc.*
471 U.S. 707 (1985) 24

Hines v. Davidowitz,
312 U.S. 52 (1941) 24

Hormel v. Helvering,
312 U.S. 552 (1941) 35

Holmberg v. Armbrecht,
327 U.S. 392 (1946) 42

Medellin v. Texas,
552 U.S. 491 (2008) 19, 20, 26

Museum of Fine Arts, Boston v. Seger-Thomschitz,
623 F.3d 1 (1st Cir. 2010) 30, 36

Oetjen v. Central Leather Co.,
246 U.S. 297 (1918) 26

Occidental Life Insurance Company v. EEOC,
432 U.S. 355 (1977) 41

Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery,
324 U.S. 806 (1945) 42

Schoeps v. Museum of Modern Art et al.,
594 F. Supp.2d 461 (S.D.N.Y. 2009) 3, 42

Texas Industries, Inc. v. Radcliff Materials, Inc.
451 U.S. 630 (1981) 38

Toledo Museum of Art v. Ullin,
477 F. Supp.2d 802 (N.D. Ohio 2006) 6

United States v. Belmont,
301 U.S. 324 (1937) 25

United States v. Morgan,
307 U.S. 183 (1939) 42

Virginia Ry. Co. v. System Federation No. 40,
300 U.S. 515 (1937) 42

Youngstown Sheet & Tube, Inc. v. Sawyer,
343 U.S. 597 (1952) 19

FEDERAL STATUTES

28 USCA § 2106 (1948) 2, 35, 36, A-37

Holocaust Victims Redress Act,
Public Law No. 105-158,
112 Stat. 15 (1998) 2, 5, 6, A-30

Nazi War Crimes Disclosure Act,
Public Law No. 105-567,
114 Stat. 2865 (1998) 5

Holocaust Assets Commission Act of 1998,
Public Law No. 105-186 (1998) 5

STATE STATUTES

La. Civ. Code Ann. Art. 3421 (1982) 2, A-38
La. Civ. Code Ann. Art. 3488 (1982) 2, A-39
La. Civ. Code Ann. Art. 3491 (1982) 2, A-40
La. Civ. Code Ann. Art. 3506 (1979) 1, 2, A-41
La. Civ. Code Ann. Art. 3544 (1991) 1, 2, A-42

MISCELLANEOUS

Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. Rev. 1245 (1996) 39

Joseph P. Crace, Jr., *Gara-Mending the Doctrine of Foreign Affairs Preemption*, 90 Cornell L. Rev. 203 (2004) 23, 26, 30

Stuart Eizenstat, *Imperfect Justice* (Public Affairs, New York 2004)..... 4, 7

Jack L. Goldsmith, *Federal Courts, Foreign Affairs & Federalism*, 83 Va. L. Rev. 1617 (1997)..... 39

Jack L. Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 S. Ct. Rev. 175 (2000)..... 24, 25

Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control (London Declaration) 3

J. Christian Kennedy, Special Envoy for Holocaust Issues, United States Department of State, *The Role of the United States in Art Restitution*, Remarks at Potsdam, Germany, April 23, 2007..... 4, 6, 8, 9

Military Government Law No. 59 (MGL No. 59) 12 Fed. Reg. 7983 (November 29, 1947) 3

17A James Wm. Moore *et al.*,
Moore's Federal Practice (3d ed. 2009)..... 38

19 James Wm. Moore, *et al.*,
Moore's Federal Practice (3d. ed. 2009)..... 35

Ved P. Nand, David K. Pansius,
2 *Litigation of International Disputes*
in Federal Courts (2010)..... 23

Caleb Nelson, *Preemption*,
86 Va. L. Rev. 225 (2000)..... 24

Restatement (Third) of the Law of
Foreign Relations of the
United States (1986) 21

Oskar Schacter, *The Twilight*
Existence of Non-Binding
International Agreements,
71 Am. J. Int'l L. 296, 300 (1977)..... 21

Elizabeth Simpson, *The Spoils of War,*
World War II and Its Aftermath: The Loss,
Reappearance and Recovery of Cultural Property
(Times-Mirror Company 1997)..... 3

Prague Holocaust Era Assets Conference:
Terezin Declaration ..... *passim*, A-12

Daniel E. Troy, Rebecca K. Wood,
Federal Preemption at the Supreme Court,
2008 Cato Sup. C. Rev. 257 24

Alan Untereiner, *The Defense of Preemption: A View From the Trenches*, 84 Tul. L. Rev.1257 (2010)..... 24

Vilnius Forum Declaration..... 9

Washington Conference Principles on Nazi-Confiscated Art .....*passim*, A-28

INTERNET SITES

http://fcit.usf.edu/HOLOCAUST/RESOURCE/Assets/981201.htm (fn.9)..... 7

http: www.lootedartcommission.com/vilnius-forum (fn. 18)..... 9

http://csce.gov/index.cfm..... 10, 11, 13, 15, 22

OPINIONS AND ORDERS BELOW

The Fifth Circuit's August 20, 2010 Opinion affirming the ruling of the District Court that federal law and policy favoring the return to rightful owners of Nazi-confiscated artworks did not preempt Louisiana prescriptive periods (La. Civ. Code Art. 3544 (1991) and La. Civ. Code Art. 3506 (1979)) that time-barred the claim of Seger-Thomschitz is reported at 615 F.3d 574 (5th Cir. 2010). The ruling of the District Court is reported at 638 F. Supp.2d 659 (E.D. La. 2009).

BASIS FOR JURISDICTION

The order of the Fifth Circuit Court of Appeals was entered on August 20, 2010. A timely petition for rehearing en banc was denied on September 24, 2010. The petition for certiorari was filed within ninety days from that date. The jurisdiction of this Court is invoked under 28 USCA § 1254(1).

The District Court and the Court of Appeals had jurisdiction under 28 USCA § 1332, in that the petitioner is a foreign citizen, the respondent is a citizen of the State of Louisiana, and the value of the painting in controversy exceeds $75,000. The Court of Appeals had jurisdiction to entertain the appeal under 28 USCA § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI Clause 2 of the Constitution of the United States (Supremacy Clause)
The Holocaust Victims Redress Act,
Public Law No. 105-158, 112 Stat. 15 (1998)
28 USCA § 2106 (1948)
La. Civ. Code Ann. Art. 3421 (1982)
La. Civ. Code Ann. Art. 3488 (1982)
La. Civ. Code Ann. Art. 3491 (1982)
La. Civ. Code Ann. Art. 3506 (1979)
La. Civ. Code Ann. Art. 3544 (1991)

STATEMENT OF THE CASE

U.S. foreign policy to return Nazi-confiscated artworks and other property to rightful owners began on January 5, 1943 when the 18 Allied governments issued the "Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control," also known as "London Declaration." The London Declaration reserved the right of the Allied governments to invalidate transfers of property by victims of persecution occurring within Nazi Germany and occupied countries "even when they purport to be voluntarily effected."[1]

Immediately after the War the U.S. and Allied authorities sought to return to Nazi victims and their heirs artworks and other property lost during the years 1933-1945 in coercive transfers. U.S. restitution policy became crystallized in 1947 with Military Government Law Number 59 (MGL No. 59), which nullified transfers of personal property by victims of Nazi persecution and became the centerpiece of post-War and Allied restitution policy. See *Schoeps v. Museum of Modern Art et al.*, 594 F. Supp.2d 461, 466 (S.D.N.Y. 2009).

U.S. foreign policy in this regard extended to judicial actions brought in U.S. courts. In *Bernstein v. N.V. Neerlandsche-Amerikaansche, Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d. Cir. 1954), the court followed a State Department directive to entertain a judicial claim seeking to recover property lost in such a "forced transfer."

---

[1] Elizabeth Simpson, *The Spoils of War, World War II and its Aftermath: The Loss, Reappearance and Recovery of Cultural Property*, (1997 Times Mirror Company) at 287.

B. In the Early 1990's - Following the Collapse of the "Iron Curtain"—Restoring Nazi-Confiscated Artworks to Holocaust Victims Again Became Viable, Sparking a Renewed U.S. Initiative Which Gained International Momentum

As U.S. Ambassador J. Christian Kennedy explained, the Cold War forestalled restoring Nazi-confiscated artworks to Holocaust victims and their heirs.[2] U.S. Ambassador Stuart Eizenstat related that the London Conference for Nazi Gold in 1997 provided an opportunity to reintroduce this subject into international diplomacy and to set the stage for a conference in Washington D.C. (Washington Conference) the following year.[3]

In February 1998, the House Banking Committee under Chairman James Leach held hearings on Nazi-confiscated art. Leach pressed representatives of the Association of Art Museum Directors (AAMD)—comprising about 170 U.S. art museums—to develop formal guidelines for handling Nazi-confiscated artworks.[4] The guidelines prescribed that museums would resolve claims for the recovery of such artworks in "an equitable, appropriate and mutually agreeable manner."[5] The U.S. hoped to persuade the nations attending the Washington Conference to adopt these guidelines.[6]

---

[2] J. Christian Kennedy, Special Envoy for Holocaust Issues, United States Department of State, *The Role of the United States in Art Restitution*, Remarks at Potsdam, Germany, April 23, 2007 ("Potsdam Remarks").

[3] Stuart Eizenstat, *Imperfect Justice* (Public Affairs, New York 2004) at 191.

[4] *Id.* at 192.

[5] *Id.* at 193.

[6] *Id.* at 193.

C. In 1998 the U.S. Congress Enacted Three Statutes to Help Holocaust Victims and Their Heirs Recover Nazi-Confiscated Artworks and Other Assets: The Holocaust Victims Redress Act, The Nazi War Crimes Disclosure Act, and The Presidential Holocaust Assets Commission Act

In 1998 Congress enacted three statutes to help victims of Nazi persecution and their heirs locate and recover artworks and other property wrongfully confiscated during the years 1933-1945: (1) the Holocaust Victims Redress Act (Redress Act), Public Law. No. 105-158, 112 Stat. 15 (1998); (2) the Nazi War Crimes Disclosure Act (Disclosure Act) Public Law No. 105-567, 114 Stat. 2865 (1998), and; (3) the Holocaust Assets Commission Act of 1998 (Commission Act), Public Law No. 105-186 (1998). These statutes formally declare U.S. policy to return Nazi-confiscated artworks and other property to rightful owners and allocate five million dollars ($5,000,000) for this purpose. Appendix [A] at 34-35.

§ 201(2) of the Redress Act characterizes Nazi Germany's systematic persecution and genocide of Jews during the years 1933-1945 as part of World War II, and prescribes that the principles of international law that require that artworks pillaged in war be returned to rightful owners should govern claims to recover Nazi-confiscated artworks. (§ 201(2)). § 202 declares that "(i)t is the sense of Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from

the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner." A at 35. The Redress Act also "authorized to be appropriated to the President $5,000,000 for archival research and translation services to assist in the restitution of assets looted or extorted from victims of the Holocaust..." (§ 103). U.S. courts consistently have acknowledged that the Redress Act states a compelling Congressional policy to return Nazi-confiscated artworks to rightful owners. *See, e.g.*, *Adler v. Taylor*, 2005 WL 4648511 at 1 (C.D. Cal. 2005), *aff'd Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007); *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 806 n.2 (N.D. Ohio 2006); *Dunbar v. Seger-Thomschitz*, 638 F. Supp.2d 659, 664 (E.D. La. 2009).

D. Late in 1998 the Executive Branch—Consonant with the Redress Act That All Nations Should Facilitate the Return of Nazi-Confiscated Artworks—Hosted the Washington Conference on Holocaust-Era Assets to Promote this Objective

The Washington Conference was a U.S. initiative. In July 2006, Eizenstat testified before a subcommittee of the U.S. House Committee on Financial Services (Subcommittee testimony) that the U.S. consistently has employed moral pressure to induce affected nations to return Nazi-confiscated art.[7] In November 1998, "the Department of State convened the Washington Conference on Nazi looted assets. Representatives of 44 countries attended."[8] The declared purpose of the Washington Conference was to find how the 44 participating countries could

[7] Subcommittee testimony at 6.

[8] Potsdam Remarks, *supra* note 2 at 2.

agree upon returning Nazi-confiscated artworks to rightful owners. U.S. Secretary of State Madeleine K. Albright declared: "[w]e're here to chart a course for finishing the job of returning or providing compensation for stolen Holocaust assets to survivors and the families of Holocaust victims."[9] She stressed the "moral imperative" to "develop specific principles and identify best practices for art"[10] and for "the return of property."[11]

1. While the U.S. Delegation Sought a Formal, Binding International Legal Agreement on Specific Principles to Return Nazi-Confiscated Artworks to Rightful Owners, Other Stakeholder Nations Rejected this Proposal

While the U.S. preferred a binding international accord committing which each stakeholder to implement national legislation to return Nazi-confiscated artworks, many countries rejected this proposal.[12] So to salvage some consensus on the responsibility of stakeholders under international law to return Nazi-confiscated artworks, Eizenstat and Leach instead promoted a non-binding agreement by which each country would commit to

---

[9] Secretary of State Madeleine K. Albright, Remarks at Opening of Washington Conference on Holocaust-Era Assets, Washington D.C., December 1, 1998, as released by the Office of the Spokesman, U.S. Department of State at 1. (Available at http://fcit.usf.edu/HOLOCAUST/RESOURCE/Assets/981201.htm

[10] *Id.* at 2.

[11] *Id.* at 2.

[12] Eizenstat, *supra* note 3 at 198.

work within its own discrete national legal system to achieve this goal.[13]

As released on December 3, 1998, the "Washington Conference Principles on Nazi-Confiscated Art" (Washington Principles or Principles) contained 11 principles regarding how countries would address Nazi-confiscated artworks and related claims. Principle 8 prescribed that if the pre-War owners of Nazi-confiscated artworks or their heirs can be identified, a "just and fair" solution should be achieved.[14] A at 28.

2. Notwithstanding that the Washington Principles are Legally Non-Binding, the U.S. Views Their Purpose as Securing the Return of Nazi-Confiscated Artworks to Rightful Owners

Both Ambassadors Kennedy and Eizenstat have made clear that the purpose of the Washington Principles is to return Nazi-confiscated artworks to rightful owners, and to induce each country to work within its own legal system to do so. As Kennedy declared at Potsdam: "[t]he Washington Principles are based on the simple premise that artworks displaced during the 1933-1945 period should be returned to rightful owners... (and) provide guidelines that could be applied to all countries under their own national laws, procedures and practices."[15]

---

[13] Subcommittee Testimony, *supra* note 7 at 7.

[14] Stuart E. Eizenstat, Opening Plenary Session Remarks at Prague Holocaust Era Assets Conference ("Opening Remarks") at 10.

[15] Potsdam Remarks, *supra* note 2.

Kennedy said further that the failure to follow them invites the moral rebuke of other stakeholders.[16] Similarly, in his Opening Remarks at the Prague Conference, Eizenstat observed that the purpose of the Principles in prescribing that Nazi confiscated artworks be identified is to secure their return to rightful owners. [17]

E. In October 2000, Officials From the U.S. and 37 Other Governments Convened in Vilnius, Lithuania to Reaffirm Their Commitment to the Washington Principles and Issued the Vilnius Forum Declaration

From October 3-5, 2000 officials from 38 governments, including the U.S., convened in Vilnius to reaffirm their commitment to the Washington Principles. On October 5, 2000, stakeholders agreed to the Vilnius Forum Declaration urging all stakeholders "to undertake every reasonable effort to achieve the restitution of cultural assets looted during the Holocaust to the original owners or their heirs" and "to take all reasonable measures to implement the Washington Conference Principles on Nazi-Confiscated Art...."[18]

---

[16] *Id.* at 3.

[17] Opening Remarks, *supra* note 14 at 9.

[18] Commission for Looted Art in Europe-Vilnius Forum Declaration, available at www.lootedartcommission.com/vilnius-forum.

F. Despite the 1998 Congressional Legislation to Help Holocaust Victims Recover Their Lost Property and the Washington Principles, U.S. Courts Continued to Time-Bar Judicial Claims to Recover Nazi-Confiscated Artworks

The Principles did not fulfill the foreign policy goal of the U. S. to return Nazi-confiscated artworks to rightful owners. And at a hearing before the Commission on Security and Cooperation in Europe (CSCE) of the Helsinki Commission in Washington D.C. on May 25, 2010 (CSCE Hearing Testimony), Eizenstat testified: "[a]nd here, permit me to be very frank: The momentum following the 1998 Washington conference to return looted art to its rightful owners has significantly dissipated."[19] Indeed, *Dunbar* observed that "[n]o court has ever adopted what Appellant is urging here—some form of special federal limitations period governing all claims involving Nazi-confiscated artworks. In such cases, courts have consistently applied state statutes of limitation."[20]

---

[19] CSCE Hearing Testimony at 6.

[20] 615 F.3d at 576-57.

G. The Failure the Washington Principles to Restore Nazi-Confiscated Artworks to Rightful Owners Induced the U.S. State Department to Promote the Prague Conference on Holocaust Assets Which Culminated on June 30, 2009 in a Purposefully Non-Binding Executive Agreement Known as the "Terezin Declaration"

In June 2009—with strong U.S. backing—some 47 nations convened the Prague Holocaust Era Assets Conference (Prague Conference), "the fifth international Holocaust-related conference that began with the 1997 London Conference."[21] In his opening remarks Eizenstat lamented that while the Washington Conference contemplated that each nation would work within its own discrete legal system to achieve the prescribed objectives—most nations had neglected this commitment.[22]

---

[21] CSCE Prepared Remarks at 1-2.

[22] Opening Remarks, *supra* note 14 at 9.

H. To Redress the Failure of the Washington Principles to Return Nazi-Confiscated Artworks to Rightful Owners, The Terezin Declaration Decreed that All Nations Would "*Make Certain*" that Their Discrete National "*Legal Systems*" Resolved Claims for the Recovery of Nazi-Confiscated Artworks "Based on the Facts and Merits of the Claims and All Relevant Documents," and Not Merely in a "Just and Fair" Manner as the Washington Principles Had Prescribed

When the Prague Conference ended, the stakeholders promulgated the Terezin Declaration (Declaration) which reaffirmed, clarified, and intensified their commitment to resolving claims for the recovery of Nazi confiscated artworks on their substantive merits. The Washington Principles had prescribed merely that claims for the recovery of Nazi-confiscated artworks be decided in merely a "just and fair" manner. The Declaration, however, expressly noted that the Principles had achieved disappointing results, and made clear that each stakeholder commits to "make certain" that its discrete national "legal system" decide such claim not merely in a "just and fair" manner—as the Principles had prescribed—but rather "***on the facts and merits***" of the claim and with reference to "all relevant documents submitted by the parties":

> Keeping in mind the Washington Conference Principles on Nazi-Confiscated Art, and considering the experience acquired since the Washington Conference, we urge all stakeholders to ***ensure*** that their ***legal systems***

> or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and ***to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims*** and all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property in order to achieve just and fair solutions, as well as alternative dispute resolutions, where appropriate under law. A at 19-20. (Emphasis, italics, and underlining added).

Both Eizenstat and Kennedy repeatedly have stressed that the purpose of the Declaration is to ensure that courts and other administrative bodies decide claims for the recovery of Nazi-confiscated artworks on their substantive merits, and without regard to otherwise applicable statutes of limitation. Before the Helsinki Commission Eizenstat related that the Declaration "urged the courts, Mr. Chairman, and other fora that decide art restitution cases to base their cases on the facts of the individual case rather than relying on technical grounds such as statutes of limitations."[23]

Similarly, Kennedy declared unequivocally that "[t]he Terezin Declaration reinforces the Washington Principles, urging that claims be resolved expeditiously and fairly, ***based on the facts and merits***." (Emphasis and italics added)[24] Kennedy explained

---

[23] CSCE Hearing Testimony, supra note 19 at 6.

[24] Statement by Ambassador J. Christian Kennedy, Special Envoy for Holocaust Issues Delivered During Town Hall

that statutes of limitation frustrate the goal of resolving claims for the recovery of Nazi-confiscated artworks on their merits.[25] He further declared that historical circumstances as well as the uncertainty of the "current restitution processes" make it unfair that claims for the recovery of Nazi-confiscated artworks be barred by statutes of limitation.[26]

Kennedy's comments echo Eizenstat's at the start of the Prague conference several months earlier. Eizenstat also declared that statutes of limitation frustrate the resolution on the merits of claims to recover Nazi-confiscated artworks.[27]

1. While the U.S. Would Have Preferred to Have Made the Terezin Declaration Legally Binding, as with the Washington Principles Other Stakeholder Nations Refused this Option so the U.S. Had to Settle for a "Non-Binding" Agreement That Similarly Relies upon Moral Suasion

At the Commission hearing Eizenstat, in response to a question from Senator Cardin why the Terezin Declaration was "non-binding," explained that a non-binding agreement was ***the only practical way*** that the U.S. could promote its foreign policy of returning property looted during the Holocaust to rightful owners. He said further that the stakeholders expected each country to achieve the stated goals of the Declaration ***in the context of***

Meeting at U.S. Department of State, September 22, 2009 ("Town Hall Statement").

[25] *Id.*

[26] *Id.*

[27] Opening Remarks, *supra* note 14 at 10.

their own national legal systems: "it is meant to mean that each state can act within its own national laws, as it sees fit, but that these are moral principles that should guide it."[28]

Eizenstat also testified that through the Declaration the parties intended to establish an international benchmark by which the conduct of each country in returning Holocaust property could be gauged.[29]

Finally, Eizenstat related that "[o]ur job in the State Department is to work with the states that participated in the Prague Conference to convert the moral commitments in the Declaration into action. And that's what we're doing with the best practices that we're now negotiating."

The Current Proceeding

On June 27, 2008 Petitioner—sole heir of Holocaust victim Oskar Reichel—filed an Answer and Counterclaim (CC) basing jurisdiction upon federal diversity (28 USCA § 1332), and responding to Dunbar's declaratory action seeking to quiet title to a painting by Austrian expressionist Oskar Kokoshka entitled "Portrait of Youth (Hans Reichel) (1910) (the Painting). The CC related the unconscionable circumstances under which Reichel surrendered the Painting in Vienna, Austria in February 1939 in a paradigmatic "forced sale" resulting from crippling Nazi persecution, and that Dunbar's late mother had constructive notice of these circumstances when she acquired the Painting in 1946. The CC petitioned, *inter alia*, that based upon controlling U.S. policy expressed ***both*** by

---

[28] CSCE Hearing Testimony, *supra* note 19 at 8.

[29] *Id.* at 8.

Congress ***and*** the President through the State Department the District Court displace the Louisiana prescriptions with appropriate federal common law and entertain the action on its merits. Petitioner's summary judgment opposition said:

> The U.S. Government has evinced strong national policies to return Nazi-confiscated artworks such as the Painting to rightful owners. Not only did Congress declare this policy unequivocally in the Holocaust Victims Redress Act of 1998 and its companion legislation, ***but the Executive Branch—through the U.S. Department of State***—continues officially to advocate the return to rightful owners of Nazi-confiscated artworks. The Office of Special Envoy for Holocaust Issues of the U.S. Department of State "(e)ncourages the restitution of artworks to rightful owners."(Emphasis and italics added) Opposition at 21-22; RE at 000282-83.

On July 2, 2009—only two days after the Declaration was issued—the district court awarded Dunbar summary judgment on her claim that the La. periods time-barred any judicial remedy of S-T to recover the Painting. *Dunbar v. Seger-Thomschitz*, 638 F. Supp.2d 659 (E.D. La. 2009). S-T appealed this ruling and on November 11, 2009 filed *Appellant's Brief*. S-T therein advanced the Declaration as augmenting and clarifying her argument that controlling U.S. policy required that the court not time-bar her claim. On August 20, 2010, the court entered its Opinion affirming the District Court's ruling. The court said that petitioner had failed to raise a foreign policy preemption argument in the District Court, extraordinary

circumstances did not justify hearing the argument on appeal, "and even if we were to consider Appellant's preemption theory, it is untenable." 615 F.3d at 578. On September 24, 2010 the court denied S-T's petition for rehearing en banc.

REASONS FOR GRANTING THE PETITION

Dunbar repudiates how the Court consistently has determined whether the President acts in foreign affairs in a manner that preempts conflicting state law. *Dunbar* undermines correspondingly the structure of the U.S. Constitution which allocates foreign policy to the "political branches" exclusively. *Dunbar* also subverts substantive U.S. foreign policy to encourage all affected nations to resolve claims for the recovery of Nazi-confiscated artworks on their merits, which both Congress and the President have declared and pursued for many years.

Dunbar holds that a purposefully non-binding executive agreement between the U.S. and 46 other nations (Declaration) which declares the textually clear commitment of all "stakeholders" to "make certain" that their discrete national "legal systems" resolve claims for the recovery of Nazi-confiscated artworks on their merits does not preempt—under the Supremacy Clause of the U.S. Constitution—a conflicting Louisiana 10 year prescriptive period for recovering chattels that precludes this objective. [La. Civ. Code Ann. § 3491 (1982)]

Dunbar reached this result by misapplying a questionable test for foreign affairs preemption that the Court intimated in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 420 n.11 (2003) for when a state regulates within an area of "traditional responsibility" or "'competence.'" In such instance,

the Court indicated that it might balance or weigh the "importance" of the state interest against the "strength" of the particular foreign policy. Applying this test, *Dunbar* implicitly concluded that the importance to Louisiana of regulating personal property within its borders outweighed the strength of U.S. foreign policy expressed in the Declaration.

Dunbar's departure from the tenets of foreign affairs "conflict" or "obstacle" preemption has sweeping significance for:

1) how the U.S. Constitution allocates foreign affairs authority to Congress and the President exclusively—with no role for states—and entrusts the Federal Judiciary to safeguard this structure by ensuring that state laws do not impair federal foreign policies, as well as for the capability of the President to conduct foreign relations and settle international claims;

2) the substantive foreign policy of both Congress and the President to return Holocaust-era artworks to rightful owners; the textual commitment of the U.S. Government in the Declaration to "make certain" that its discrete national "legal system" resolves these claims on their substantive merits, the capability of the State Department to persuade other stakeholders to honor this promise, and;

3) Holocaust victims internationally seeking to recover Nazi-era artworks, U.S. collectors and tax-exempt museums in possession of these artworks, and the international art market which is centered in New York.

I. *Dunbar* Abandons the Analytical Framework That the Court Consistently Has Employed to Determine When the President Acts in Foreign Affairs in a Manner that Preempts Conflicting State Law—the "Tripartite" Scheme of Justice Jackson in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952)—Thereby Skewing the Court's Preemption Doctrine as well as Recent Foreign Affairs Decisions

A. *Dunbar* Scuttles the "Tripartite" Framework of *Youngstown*—Which the Court Recently Reaffirmed in *Medellin v. Texas*, 552 U.S. 491, 524 (2008)—By Ignoring that the Redress Act Expressly Approves the President's Substantive Foreign Policy to Return Nazi-Confiscated Artworks that the Declaration Embodies and so Invests this Policy with the Preemptive Authority of Both Political Branches

Medellin reaffirmed that the "familiar tripartite scheme" of Justice Jackson in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 635 (1952) "provides the accepted framework for evaluating executive action in foreign affairs." 552 U.S at 524. Quoting *Youngstown*, the Court said that in foreign affairs "'[w]hen the President acts pursuant to an express or implied authorization from Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." 343 U.S. at 635. Moreover, the Court has adhered to this approach for many years. *See, e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981), quoting *Youngstown*.

The declaration of Congress in the Redress Act that all nations should return Nazi-confiscated art-

works to rightful owners—and its allocation of $5 million dollars toward this goal—amplified necessarily the President's ***already presumptively valid*** exercise of claims settlement authority in the Declaration.

Dunbar, however, ignores this framework and that the foreign policy embodied in the Declaration has the explicit textual approval of ***both*** political branches for preemption purposes. *Dunbar* then discards the lodestar that consistently has guided the Court in resolving the recurring and often vexing constitutional question whether a particular action of the President in foreign affairs preempts conflicting state law.[30] *Dunbar* thereby skews the Court's decisions and invites further error from the lower courts in this most consequential area.

B. *Dunbar* Overlooks that the Declaration Reflects a Prototypical Exercise of Presidential International Claims Settlement Authority—Which the Court in *Medellin* Recently Reaffirmed—That Would Preempt Conflicting State Law Even Had Congress Not Expressly Approved the President's Foreign Policy Initiative To Return Nazi-Confiscated Artworks to Rightful Owners

In *Medellin* the Court confirmed that the President enjoys a special capability in foreign affairs to settle international claims, and that the acquiescence by Congress for more than 200 years in this practice provides an historical "gloss" on the President's textual constitutional authority which validates this power. (Citation omitted) 552 U.S. at

---

[30] *See Dames & Moore v. Regan*, 453 U.S. 654, 660-62 (1981).

530-31. Moreover, *Garamendi* said that the President's claims settlement authority includes specifically the power to resolve claims emanating from the Holocaust. 539 U.S. at 420.

Dunbar, however, fails to accord the Declaration the necessary preemptive effect that a paradigmatic exercise of the President's international claims settlement authority entails. *Dunbar* then undermines the capability of the President to conduct foreign affairs in an area where the Court has affirmed that the President enjoys presumptive autonomy, and to resolve Holocaust claims internationally in the manner that he has selected.

C. *Dunbar* Ignores that as a Purposefully Non-Binding Executive Agreement that Relies Upon Moral Suasion, the Declaration Reflects a Discrete and Acknowledged Diplomatic Option For the President to Conduct Foreign Affairs and to Settle International Claims

Non-binding executive agreements are a discrete diplomatic option for promoting a particular foreign policy when a binding agreement is not politically possible, and create moral and political obligations. *See, e.g.*, *Restatement (Third) of the Law of Foreign Relations of the United States*, § 301 (1986), Reporters Note 2 at 151: "[p]arties sometimes prefer a non-binding agreement in order to avoid legal remedies. Nevertheless, the political inducements to comply with such agreements may be strong and the consequences of non-compliance may sometimes be serious." Oskar Schacter, *The Twilight Existence of Non-Binding International Agreements*, 71 Am. J. Int'l L. 296, 300 (1977), observing that what "non-binding" means is "simply that non-compliance by a

party would not be a ground for a claim for reparation of judicial remedies... [*T]he understanding and expectation is that national practices will be modified, if necessary, to conform to those understandings*." (Emphasis and italics added)

Indeed, Eizenstat explained the purpose of the Declaration in just these terms at the Helsinki Commission Hearing. (This testimony is available at http://csce.gov/index.cfm). By failing to honor the Declaration as a purposefully non-binding executive agreement, *Dunbar* denied the President a demonstrably ***essential*** diplomatic option to promote U.S. foreign policy to return Nazi-confiscated artworks to rightful owners.

D. *Dunbar* Presents the Court with a Need to Revisit When State Laws Within an Area of "Traditional Responsibility" Conflict Impermissibly with Executive Branch Foreign Policy and so Are Preempted Under the Supremacy Clause—A Test that the Court Hypothesized in *Garamendi* (539 U.S. at 420, n.11) But that *Dunbar* Necessarily Misapplied

1. The "Balancing" Test for Federal Foreign Affairs Preemption Intimated in Footnote 11 of *Garamendi* Suggests that State Laws and Policies Can Override Clearly Declared and Vigorously Pursued Foreign Policy Objectives of Both Political Branches and Wrongfully Interjects the Federal Judiciary as a Substantive Foreign Policy Decision-Maker

Garamendi intimated a test for federal preemption in foreign affairs when a state addresses

a "traditional state responsibility" ("*Garamendi* test") 539 U.S. at 420, n.11. The Court said that when a state regulates in "what Justice Harlan called its 'traditional competence'...but in a way that affects foreign relations, it might make good sense to require a conflict of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted. Whether the strength of the federal foreign policy interest should itself be weighed is, of course, a further question." *Id.*

This test apparently contemplates that when a state law addresses such "traditional responsibility," the federal courts somehow will *balance* the "importance" of the particular state interest at issue with the "strength" of the foreign policy to determine whether foreign policy preempts state law. "[T]his language suggests that although foreign affairs is exclusively federal and no substantial conflict will be tolerated, the assessment will be made within the context of the relative legitimate interests of the states."[31]

But this test "ignore(s) the problem of discerning state and federal areas of supremacy" and "[a]s such...does not come close to setting a clear standard articulating when a state action sufficiently affects foreign affairs to necessitate preemption."[32] The failure of *Garamendi* to articulate a clear test for foreign affairs preemption is most consequential and deserving of the Court's attention, for preemption is

---

[31] *See, e.g.* Ved P. Nand, David K. Pansius, *2 Litigation of International Disputes in Federal Courts*, § 11:10 (2010).

[32] Joseph P. Crace, Jr., "*Gara-mending the Doctrine of Foreign Affairs Preemption*," 90 Cornell L. Rev. 203, 223-224 (2004).

"a bedrock feature of our constitutional system,"[33] and "is almost certainly the most frequently used doctrine of constitutional law in practice."[34] A clear and prospective standard for foreign affairs conflict or "obstacle" preemption is all the more important in a world in which the individual states more frequently engage foreign countries in commerce, and the world is more "interconnected."[35]

While foreign affairs preemption doctrine may be a "muddle,"[36] it nonetheless traditionally has embodied certain core principles that the *Garamendi* test would appear to forsake. First, the *Garamendi* test challenges the prevailing assumption that the Court will readily preempt state laws that infringe upon foreign affairs. "Looking at the history of one area of federal law, the Court has been particularly willing to preempt state laws that touch on foreign affairs."[37] *See, e.g. Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985): "in the seminal case of *Hines v. Davidowitz*, 312 U.S. 52...(1941), the Court inferred an intent to preempt from the dominance of the federal interest in foreign affairs because 'the supremacy of the national power in the general field of foreign affairs...is made clear by the Constitution.' *Id.* at 62." And "[m]any have concluded that *Hines*

---

[33] Alan Untereiner, *The Defense of Preemption: A View from the Trenches*, 84 Tulane L. Rev. 1257, 1258 (2010).

[34] Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 226 (2000).

[35] *See, e.g.*, Jack L. Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 S. Ct. Rev. 175, 196 (2000).

[36] Nelson, *supra* note 34 at 232-33. *See also* Goldsmith, *Id.* at 178: "[t]he Supreme Court's preemption jurisprudence is famous for its incoherence. The doctrines of preemption are vague and indeterminate."

[37] Daniel E. Troy, Rebecca K. Wood, *Federal Preemption at the Supreme Court*, 2008 Cato Sup. C. Rev. 257, 274.

establishes a rule that preemption is much more easily found when Congress has passed legislation relating to foreign relations." (Citation omitted)[38]

Second, the *Garamendi* test repudiates the Court's traditional approach to preemption—especially in foreign affairs—which views the importance of the affected state interest as inconsequential. *See, e.g. Felder v. Casey*, 487 U.S. 131, 138 (1988), "[u]nder the Supremacy Clause of the federal Constitution, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law for 'any state law, however within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' Citing *Free v. Bland* , 369 U.S. 663, 666 (1962)"; *United States v. Belmont*, 301 U.S. 324, 331 (1937): "[i]n respect of all negotiations and compacts, and in respect of our foreign relations generally... state policies *are irrelevant to the inquiry and decision*." (Italics supplied)

Third, by envisioning that courts will balance the "strength" of clearly articulated U.S foreign policy against the "importance" of competing state interests, the *Garamendi* test necessarily endows the federal judiciary with a pivotal role in foreign affairs. This test would appear to allow federal courts to nullify clearly articulated foreign policy objectives of both political branches whenever a court believes that competing state interests should predominate—thereby making the Judiciary, and not Congress and the President—the ultimate arbiter of U.S. foreign policy.

This role violates the U.S. Constitution and also contravenes the consistent historical understanding

---

[38] Goldsmith, *supra* note 35 at 188.

of the Court that foreign affairs decisions belong exclusively to the political branches (Congress and the President). The federal judiciary has ***no*** substantive foreign affairs authority. *See, e.g Medellin v. Texas,* 552 U.S. 491, 511 (2008), reaffirming the "principle that '[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political Departments'" (citing *Oetjen v. Central Leather Co.*, 246 U.S. 297, 301 (1918). Accordingly, "the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen*, 246 U.S. at 302. *See also, e.g., Garamendi*, 539 U.S. at 427 observing that "our thoughts on the efficacy of the one approach or the other are beside the point, since our business is not to judge the wisdom of the National Government's policy: dissatisfaction should be addressed to the President, or, perhaps, Congress."; *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981), noting that "the Framers 'did not make the judiciary the overseer of our Government.'" (Citation omitted). So "with regard to foreign affairs, judicial decision making bypasses procedural safeguards of the legislative process, producing a lack of political accountability and democratic legitimacy."[39]

Not only does the *Garamendi* test discount established tenets of foreign affairs preemption, it also opens a Pandora's box of questions about how federal courts should administer this test. Even assuming, *arguendo*, that this test reflected a valid exercise of federal judicial authority, what standards does a federal court invoke to balance or weigh the "strength" of an expressly stated and constitutionally

---

[39] Joseph P. Crace, Jr., *Gara-mending the Doctrine of Foreign Affairs Preemption*, 90 Cornell L. Rev. 203, 229 n. 171 (2003).

legitimate foreign policy against the comparative "importance" of a conflicting state law? As a threshold matter, is a federal court equipped to gauge the true "strength" of a discrete foreign policy without jeopardizing a delicate and subtle balance of reciprocal concessions? Can a state immunize a particular law from preemption merely by declaring the importance of such law? Does an implicit balance decimate the traditional doctrine of "conflict" or "obstacle" preemption in foreign affairs in which all that has traditionally been required is an ascertainable conflict between express foreign policy and state law?[40]

Petitioner respectfully submits that the *Garamendi* implied "balancing" test is neither judicially appropriate nor manageable. Rather, the Court should limit its inquiries in federal foreign affairs preemption to: (1) whether the President's foreign policy in a particular instance is constitutionally valid under *Youngstown*, or represents an exercise of international claims settlement authority; and (2) whether the Executive Branch or Congress have stated the policy with sufficient clarity. These inquiries evoke core judicial competence. If the answer to both questions is in the affirmative, the Supremacy Clause requires that foreign policy preempt state law, regardless of the importance to the state of the particular interest in question or

---

[40] *See, e.g., Garamendi*, 539 U.S. at 427 observing that "[t]he question relevant to preemption...is conflict and the evidence here 'is more than sufficient to demonstrate that the state Act stands in the way of [the President's] diplomatic objectives. Goldsmith, *supra* note 35 at 185, pointing out that the federal preemption doctrine "does not contemplate any special requirement to trump state law over and above consistency with the lawmaking procedures in Articles I and II."

whether the law represents an exercise of a state's "traditional responsibility."

2. *Dunbar* Applied the Foreign Affairs Preemption Test Intimated in *Garamendi* N. 11 in a Manner That Makes Manifest Its Many Deficiencies and that Subordinates to State Prerogatives the Textually Clear and Proactive Foreign Policy of ***Both*** Congress and the President to Return Nazi-Confiscated Artworks to Rightful Owners

Dunbar makes palpable the many deficiencies of the *Garamendi* implied balancing test. As a threshold matter, *Dunbar* acknowledges that "[s]ignificantly, *Garamendi* found preemption while acknowledging the absence of either an express federal preemption clause or a direct conflict between California and federal law." 615 F.3d at 578. *Dunbar* also appeared to concede that the constitutionally valid federal foreign policy expressed in the Declaration conflicted with the Louisiana prescriptive period, as Executive Branch officials had declared that state limitation periods were incompatible with federal foreign policy that claims for the recovery of Nazi-confiscated artworks be decided upon their substantive merits. *Id.* at 578-79.

As noted, the transparent conflict between the clearly stated foreign policy embedded in the Declaration and the subject Louisiana prescriptive period preempts Louisiana law under any traditional foreign affairs preemption standard. Any contrary conclusion would allow state law to obstruct the textually clear foreign policy of both political branches in an executive agreement that also

represents a prototypical exercise of Presidential international claims settlement authority. **But this is precisely what *Dunbar* does.**

Dunbar distinguished between the category of preemption in *Garamendi* and the argument that federal foreign policy expressed in the Declaration preempted the subject Louisiana prescriptive periods. In *Garamendi*, *Dunbar* said, "California was essentially pursuing independent policy objectives in favor of Holocaust victims," while "[i]n this case Louisiana has not pursued any policy specific to Holocaust victims or Nazi-confiscated artworks. The state's prescription periods apply generally to any challenge of ownership to moveable property." 615 F.3d at 579. *Dunbar*, however, overlooked that in *Garamendi* the Court made clear that even when a state acts within such an area of "traditional competence"—with no intention of affecting foreign affairs—Executive Branch foreign policy nonetheless preempts such law whenever it has more than a merely incidental impact upon foreign policy, and most certainly when the state law frustrates or sabotages clearly expressed foreign policy objectives. 539 U.S. at 420, n.11. The Court observed that even under the judicial view of preemption that protects the autonomy of the several states to the greatest degree, "the likelihood that state legislation will produce something more than an incidental effect in conflict with express foreign policy of the National Government would require preemption of the state law." *Id.* at 420.

Dunbar, however, disregards this principle. While apparently acknowledging both the clarity and the *bona fides* of Executive foreign policy expressed in the Declaration to decide claims for the recovery of Nazi-confiscated artworks on their

merits, *Dunbar* concluded nonetheless that this policy either was not sufficiently "weighty" or adequately stated to overcome the interest of Louisiana in prescribing time limits for the recovery of personal property. 615 F.3d at 579.

Dunbar savages traditional foreign affairs "conflict" preemption doctrine. First, it ignores that all that has traditionally been required for federal foreign affairs preemption is a concrete conflict between legitimate federal foreign policy and state law. *Garamendi* reaffirms this principle. The clearly articulated U.S. foreign policy textually expressed in the Declaration satisfies this test beyond question.

Second, *Dunbar* all but obliterates the doctrine of conflict preemption in foreign affairs. By requiring S-T to proffer "proof that U.S. policy on behalf of Holocaust victims is committed to overriding generally applicable state property law,"[41] *Dunbar* requires something tantamount to *express* preemption—an explicit statement by Congress or the President of a federal intent to preempt *specific* state laws in a particular foreign affairs context. This prescription lacks Court precedent and is unworkable. If validated, it would undermine the capability of the political branches to conduct foreign policy. [42]

Augmenting the confusion in current law, *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1, 12 n. 12 (1st Cir. 2010) ("*MFA*") questioned the continuing validity of *Garamendi*, but invoked *Dunbar* for its conclusion that *Garamendi*

---

[41] 615 F.3d at 579.

[42] *See, e.g.*, Crace, *supra* note 32 at 232, relating that "[i]n the high stakes world of foreign affairs, Congress or the President often cannot effectively respond to offensive state activity before adverse consequences occur."

did not preempt a Massachusetts three year statute of limitation barring an identical claim.

II. *Dunbar* Mistakes the Politically Brokered and Purposefully Non-Binding Language of the Declaration that the Stakeholders Agree that Their Discrete National Legal Systems Resolve Claims for the Recovery of Nazi-Confiscated Artworks on Their Substantive Merits with the Far More Emphatic Foreign Policy of Both Political Branches of the U.S. Government to Return Nazi-Confiscated Artworks to Rightful Owners Thereby Undermining—Correspondingly—U.S. Foreign Policy in Several Important Ways

A. *Dunbar* Erroneously Views the Politic Language of the Declaration as Co-Extensive with the Affirmatively Declared and Pursued Substantive U.S. Foreign Policy of Both "Political Branches" to Return Nazi-Confiscated Artworks to Rightful Owners

Dunbar misapprehends the pivotal distinction between the politically circumspect Declaration and the impassioned substantive U.S. foreign policy of both political branches to return Nazi-confiscated artworks to rightful owners. *Garamendi* made clear that it is the substantive Executive Branch foreign policy that preempts conflicting state law and ***not*** the agreement itself. The Court noted that because the subject executive agreements "include no preemption clause," the preemption claim must "rest on asserted interference with the foreign policy those agreements embody." 539 U.S. at 417. *Dunbar* misapplies this principle.

B. *Dunbar* Also Misconstrues the Declaration in Several Other Respects, Impairing U.S. Foreign Policy Correspondingly

In supporting its conclusion that the U.S. foreign policy does not preempt Louisiana law, *Dunbar* says that "[i]ndeed the Terezin Declaration itself contains language noting that 'different legal traditions' should be taken into account." 615 F.3d at 578. *Dunbar* misconstrues this language. For rather than exonerating stakeholders from honoring their reciprocal commitments to resolve claims for the recovery of Nazi-confiscated artworks on their merits based upon their individual legal systems, this language instead seeks to ensure that each nation will achieve this objective within the context of its own discrete legal tradition, ***notwithstanding*** that these traditions may vary.

C. *Dunbar* Subverts U.S. Foreign Policy to Return Nazi-Confiscated Artworks to Rightful Owners in Several Ways

First, *Dunbar* frustrates the clearly-declared substantive foreign policy of both political branches that U.S. courts adjudicate claims for the recovery of Nazi-confiscated artworks on their substantive merits.

Second, *Dunbar* breaches the promise of the U.S. Government in the Declaration to "make certain" that its national "legal system" resolves judicial claims for the recovery of Nazi-confiscated artworks on their substantive merits. *Dunbar*, then, undermines U.S. foreign policy credibility and commitment on an important issue that both Congress and the President have engaged and upon

which the U.S. Government has taken the international initiative. *Dunbar* also almost certainly causes collateral but perhaps indeterminate damage to U.S. credibility on other foreign policy issues.

Third, by refusing to honor the U.S. commitment in the Declaration to "make certain" that the U.S. national "legal system" resolves claims for the recovery of Nazi-confiscated artworks on their merits, *Dunbar* precludes any possibility that the U.S. Government can persuade other stakeholders to honor their reciprocal commitments. Eizenstat identified this to be U.S. foreign policy after the Declaration.

III. *Dunbar* Ignores that as a Coordinate Branch of the U.S. Government the Federal Judiciary—in the Absence of Congressional Legislation Implementing the Declaration—Has an Affirmative Responsibility to "Make Certain" (as the Declaration Prescribes) that the U.S. National "Legal System" Resolves Judicial Claims for the Recovery of Nazi-Confiscated Artworks on Their Substantive Merits By Invoking Federal Common Law to Achieve This Objective

A. Rather Than Entertaining the Preemption Argument of S-T on Its Merits *Dunbar* Instead Held—Both Erroneously and Wrongfully—that S-T Had Failed to Raise Her Preemption Argument in the District Court Which She Expressly Did

Dunbar held—both erroneously and wrongfully—that petitioner failed to raise a foreign policy preemption argument in the District Court. But as

noted, in the District Court S-T asserted both the Redress Act and official State Department policy in support of her argument.

Moreover, the Declaration was not issued until June 30, 2009—more than 6 months ***after*** S-T filed her summary judgment opposition—and only two days before the District Court ruled. So the record clearly shows that S-T raised a federal foreign preemption argument in the District Court based upon the official foreign policy declarations of ***both*** political branches sufficient to invoke the Declaration in support of her arguments on appeal.

Dunbar also said that Petitioner properly should have cited the Washington Principles—a predecessor of the Declaration—in support of her argument before the District Court. 615 F.3d. 574. But *Dunbar* overlooks that the Declaration purposefully amplified the nebulous directive of the Principles that claims for the recovery of Nazi-confiscated artworks be decided merely in a "just and fair" manner to mean—much more concretely—that claims be decided on "the facts and merits of the claim." Accordingly, the Declaration clarified substantive U.S. foreign policy in a way that was not earlier evident. So when S-T filed her summary judgment opposition in the District Court the injunction in the (Principles) that claims be decided merely in a "just and fair" manner was not nearly as probative of ***substantive U.S. foreign policy*** as were the contemporaneous statements of the State Department and Office of Special Envoy for Holocaust Issues of the U.S. Department of State which "encourages the restitution of artworks to rightful owners" which S-T ***did*** cite.

B. Even Assuming, *Arguendo*, that S-T Failed to Raise Her Preemption Argument in the District Court *Dunbar* Abused Its Discretion Under 28 USCA § 2106 By Refusing to Consider for the First Time on Appeal a Purely Legal Argument with Signal Constitutional and Foreign Policy Significance, Especially When the Declaration Occurred Contemporaneously with the Summary Judgment Ruling of the District Court

The Court and federal appellate courts enjoy plenary authority to entertain questions for the first time on appeal as justice may require. 28 USCA §2106. The Court has counseled that "(t)here may always be exceptional circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon the court...below." *Hormel v. Helvering*, 312 U.S. 552, 556-57 (1941). *See also* 19 James Wm. Moore, *Moore's Federal Practice* § 205.05[2] (3d. ed. 2009): "(a) circuit court may disregard the rule in compelling circumstances, such as...a serious issue of public policy, or for error that works manifest injustice. This is particularly so if the issue has been fully briefed, if the issue is a matter of law...if there will be no prejudice to any party, and if no purpose is served by remand to the district court." *Id.* at § 205-57-58.

Each of these factors supports an exercise of the Court's discretion to consider why Executive Branch foreign policy as expressed in the Declaration preempts the Louisiana prescriptive periods. First, this question without doubt has great foreign policy and Constitutional law significance. Moreover

Dunbar and *MFA* misapply *Garamendi* and federal foreign affairs preemption doctrine and threaten to injure irreparably U.S. foreign policy to persuade other stakeholder nations to honor the Declaration. This consideration necessarily makes it all the more important that the Court review this question.

Second, the relevant issue is *purely a question of law* which does not entail any fact finding by the District Court.

Third, Dunbar fully briefed the question, so she would suffer no prejudice if the court decided it.

Finally, no purpose would be served by remanding the case to the District Court.

C. Because the Declaration Expresses the Explicit Foreign Policy Goal of *Both* Congress and the President that Legal Provisions Other than Statutes of Limitation Not Impede Resolving Claims for the Recovery of Nazi-Confiscated Artworks on Their Substantive Merits, This Provision Necessarily Constitutes a Substantive Foreign Policy Directive of Both Political Branches to Federal Courts—Which Enjoy ***No*** Foreign Policy Authority under the U.S. Constitution—To Exercise Their Discretion Under 28 USCA § 2106 to Entertain Judicial Claims to Recover Nazi-Confiscated Artworks

The Declaration prescribes that "Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, to achieve just and fair solutions..." ("Nazi-Confiscated and Looted Art," par. 3). Properly understood, this provision states a preference by the political

branches responsible for foreign policy that the Federal Judiciary (a coordinate branch of the U.S. Government) entertain its discretion under 28 USCA § 2106 (as well as under any other potentially relevant "legal provision") to resolve judicial claims for the recovery of Nazi-confiscated artworks on their substantive merits. This provision necessarily composes part of the foreign policy commitment that the U.S. Government made in the Declaration "to make certain" that its discrete national "legal system" resolve judicial claims for the recovery of Nazi-era artworks on their merits.

Dunbar, however, failed to appreciate that this provision functions as a "backstop" in the Declaration to reinforce the reciprocal commitments of the stakeholders.

D. The Federal Judiciary Appropriately Applies Federal Common Law to Protect the Interests of the U.S. Government in Foreign Affairs: Federal Common Law is *Essential* in this Context to Ensure that the U.S. Government Fulfills Its Pledge in the Declaration to "Make Certain" that the Discrete U.S. National "Legal System" Resolves Claims for the Recovery of Nazi-Confiscated Artworks on Their Substantive Merits

1. *Dunbar* Erroneously Concluded that the Declaration Does Not Implicate U.S. International Relations in a Manner that Justifies the Application of Federal Common Law

Dunbar wrongfully concluded that "no international disputes are implicated in this controversy that require creation of a uniform federal rule of

law." 615 F.3d at 577. This conclusion contravenes the express prescription of *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981), that federal common law is appropriate in contexts that implicate "our relations with foreign nations," as well as the consistent understanding that federal common law is broadly applicable in foreign affairs. *See, e.g. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-27 (1964), relating that "[f]ederal law governs suits affecting international relations"; 17A James M. Moore *et al.*, *Moore's Federal Practice*, *supra*, § 124.45 at 124-141 (3d ed. 2009), observing that because "federal law governs suits affecting international relations," a "basic rule empowers federal courts to create federal common law in actions relating to foreign affairs," and the "basic *Sabbatino* rule that empowers federal courts to create federal common law in actions relating to foreign affairs is still valid." *Id.*

2. As a Coordinate Branch of the U.S. Government the Court Appropriately Applies Federal Common Law in Foreign Relations to Protect the Structure of the Federal Constitution—Which Assigns Foreign Policy ***Exclusively*** to Congress and the President—and To Ensure that State Laws Do Not Undermine or Obstruct Federal Foreign Policies

"Many of the rules that the Supreme Court... characterizes as federal common law are merely background rules that federal and state courts apply in order to avoid encroaching upon authority committed by the Constitution to Congress and the President. This is particularly true with respect to

rules relating to foreign affairs."[43] Accordingly, "there is a remarkable consensus about the legitimacy of federal common law in foreign relations...Foreign relations is viewed as a special case because it is viewed as the exclusive prerogative of the federal government."[44] The traditional view is that courts must apply federal common law in foreign affairs when necessary to safeguard "structural constitutional guarantees" and to ensure that state laws do not undermine U.S. foreign relations and that such "judge-made federal foreign relations law" constitutes the legitimate voice of the federal government in foreign affairs "until the federal political branches say otherwise."[45] *See also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n. 25 (1964) ("[v]arious constitutional and statutory provisions...reflect[ ] a concern for uniformity in this country's dealing with foreign nations and indicate a desire to give matters of international significance to the jurisdiction of the federal institutions."

In *Sabbatino* the Court invoked federal common law to protect the prerogative of the federal political branches to conduct foreign policy and to obviate state intrusions. *Sabbatino* underscored that the act of state doctrine was part of the federal common law, and that despite the decision in *Erie R. Co. v. Tomkins*, 304 U.S. 64 (1938) (generally abrogating "federal common law"), "there are enclaves of federal judge-made law which bind the states... and [p]rinciples formulated by federal judicial law have been thought by this Court to

---

[43] Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1252 (1996).

[44] Jack L. Goldsmith, *Federal Courts, Foreign Affairs and Federalism*, 83 Va. L. Rev. 1617, 1632 (1997).

[45] *Id.*

be necessary to protect uniquely federal interests." 376 U.S. at 426. The Court said further that the "vitality" of the act of state doctrine as a principle of federal common law "depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing on foreign affairs." *Id.* at 427-28. *Sabbatino* deemed a uniform federal rule necessary to preclude the several states from impairing U.S. foreign policy by applying discrete and potentially provincial rules of decision to judicial controversies with foreign nations.

For these same reasons the Court should exercise its federal common law authority to create a uniform rule of timeliness for state courts when adjudicating claims for the recovery of Nazi-confiscated artworks. Just as the act of state doctrine in *Sabbatino* reflected the appropriate constitutional balance of authority "between the judicial and political branches of the Government on matters bearing upon foreign affairs," so too the Declaration entails a similar balance as it express the substantive foreign policy of both Congress and the President on how U.S. courts should decide judicial claims to recover Nazi-confiscated artworks. Just as in *Sabbatino*, the Court must fashion a uniform rule of decision for all U.S. courts adjudicating claims to recover Nazi-confiscated artworks that acknowledges the constitutional authority of the political branches to formulate substantive foreign policy in this area and implements—correspondingly—the express commitment of the U.S. Government in the Declaration to ensure that its national "legal system" resolves judicial claims for the recovery of Nazi-confiscated artworks on their substantive merits.

3. Federal Common Law—and Federal Equitable Doctrine—Are the Appropriate Means For the Court To Ensure that the U.S. Government Fulfills Its Foreign Affairs Commitment in the Declaration to "Make Certain" that its Discrete National "Lægal System" Resolves Judicial Claims for the Recovery of Nazi-Confiscated Artworks on Their Substantive Merits and in a "Just and Fair" Manner

"In determining the content of federal common law, a court is free to choose any rule it deems appropriate..." *Id.* at § 4514. Courts may consider "what rule is best designed to implement the underlying federal policy or statute involved in the litigation (including) general considerations of equity jurisprudence..." *Id.*

Federal common law authority extends to replacing state prescriptive periods that impair federal policies or interests with alternative federal statutes of limitation or the equitable doctrine of laches. *See Occidental Life Insurance Company v. EEOC*, 432 U.S. 355, 367 (1977), ***"(s)tate legislatures do not devise their limitation periods with national interests in mind***, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies." (Citation omitted, emphasis and italics added).

By prescribing the flexible federal equitable doctrines of laches and unclean hands as a uniform rule of decision for U.S. courts adjudicating judicial claims to recover Nazi-confiscated artworks, the Court will implement appropriately the commitment of the U.S. Government in the Declaration to "make certain" that the U.S. national "legal system" resolves claims for the recovery of Nazi-confiscated

artworks on their substantive merits and in a "just and fair manner." For unlike rigid statutes of limitation and related accrual principles, federal equitable doctrine focuses instead upon the fundamental fairness of allowing a particular claim to proceed in a given context. *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). Most importantly, federal equitable doctrine also explicitly promotes the discrete public policies that the U.S. government has enunciated in a particular context. *See, e.g., Virginia Ry. Co. v. System Federation No. 40*, 300 U.S, 515, 552 (1937): "(c)ourts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved"; *United States v. Morgan*, 307 U.S. 183, 194 (1939). And the federal equitable doctrine of "unclean hands" expressly accommodates the public interest. *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery*, 324 U.S. 806, 815 (1945). Federal equitable doctrine therefore can accommodate appropriately the foreign policies that the Declaration expresses regarding how claims to recover Nazi-confiscated artworks should be decided.

Schoeps v. Museum of Modern Art et. al., 594 F. Supp.2d 461, 467 (S.D.N.Y. 2009) shows how equitable doctrine can implement the Declaration. In a federal diversity action, *Schoeps* applied New York equitable principles to entertain on their merits consolidated claims against two New York museums for the recovery of two iconic Picasso paintings that a victim of Nazi persecution putatively lost as a result of duress during the Nazi era.

CONCLUSION

For the foregoing reasons the Court should grant this petition for writ of certiorari.

Respectfully submitted,

THOMAS J. HAMILTON
Byrne Goldenberg & Hamilton, PLLC
1025 Connecticut Avenue, N.W.
Suite 1012
Washington, D.C. 20036
202-857-9775

STEPHEN H. MYERS
600 Jefferson Street, Suite 401
Post Office Box 51222
Lafayette, Louisiana 70505-1222
337-266-2225

Counsel of Record and
Attorneys for Petitioner

No. _____

In The

Supreme Court Of The United States

CLAUDIA SEGER-THOMSCHITZ,
Petitioner

v.

SARAH BLODGETT DUNBAR,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

APPENDIX:
TABLE OF CONTENTS

Appendix A – Order of the United States Court of Appeals for the Fifth Circuit, filed August 20, 2010, affirming the ruling of the District Court A-1

Appendix B – Per Curiam Order of the United States Court of Appeals for the Fifth Circuit, filed on September 24, 2010, Denying Petition for Rehearing En Banc A-9

Appendix C – Article VI, Clause 2 of the United States Constitution (Supremacy Clause) A-11

Appendix D – Prague Holocaust Era Assets Conference: Terezin Declaration A-12

Appendix E – Washington Conference Principles on Nazi-Confiscated Art (Washington Principles) A-28

Appendix F – The Holocaust Victims Redress Act, Public Law No. 105-158, 112 Stat. 15 (February 13, 1998) A-30

Appendix G – 28 USCA Section 2106 ..... A-37

Appendix H – La. Code Civ. Ann. Art. 3421 (1982) A-38

Appendix I – La. Civ. Code Ann. Art. 3488 (1982) A-39

Appendix J – La. Civ. Code Ann.
Art. 3491 (1982) A-40

Appendix K – La. Civ. Code Ann.
Art. 3506 (1979) A-41

Appendix L – La. Civ. Code Ann.
Art. 3544 (1991) A-44

Appendix M – Letter from Kunsthaus Zürich (Switzerland) Dated October 19, 2010 Invoking *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F. 3d 1 (1st Cir. 2010) to Deny Claim for the Return of Third Kokoschka Artwork that Nazi Victim Reichel Lost in Same Coercive Transaction as Painting at Issue in *Dunbar* A-46

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-30717

United Slates Court of Appeals
Fifth Circuit
FILED
August 20, 2010
Lyle W. Cayce
Clerk

SARAH BLODGETT DUNBAR,
Plaintiff – Appellee
v.
CLAUDIA SEGER-THOMSCHITZ, Doctor,
Defendant – Appellant

Appeal from the
United States District Court
for the Eastern District of Louisiana

Before JONES, Chief Judge, and
KING and HAYNES, Circuit Judges.
EDITH H. JONES, Chief Judge:

A painting by Oskar Kokoschka entitled *Portrait of Youth* (Hans Reichel)(1910) ("the painting") is currently in the physical possession of the Appellee, Sarah Dunbar, in New Orleans, Louisiana. Appellant, Dr. Claudia Seger-Thomschitz, claims title to the painting, asserting that it was "confiscated" by the Nazis from her deceased husband's family. Dunbar sued to quiet title to the painting based on her ownership by acquisitive prescription under Louisiana law and the fact that

Seger-Thomschitz's claims were barred by Louisiana's prescriptive laws. The district court granted summary judgment in favor of Dunbar. Seger-Thomschitz now appeals, asserting that this court should invoke "federal common law authority" to displace Louisiana law and Louisiana law is under Louisiana law. Undisputed evidence also established that the Reichel family sought post-Nazi compensation for other works of art and property, but not for this painting. The family twice loaned this painting to Kallir for exhibit and possible sale prior to the Nazi occupation of Austria. Significantly, those members of the Reichel family with direct knowledge of the painting's sale never sought its return.

On appeal, Appellant no longer relies on the HVRA, nor does she question that Louisiana prescriptive laws were correctly applied. Instead, she argues that Louisiana law should not be applied at all. Appellant contends that the court should invoke its "federal common law authority" to displace Louisiana law, and Louisiana law is preempted by the "Terezin Declaration," a non-binding document promulgated at the Prague Holocaust Assets Conference of June 30, 2009.

II.

We review the district court's grant of summary judgment *de novo*. *Bridgmon v. Array Sys. Corp.*, 325 F.3d 572, 576 (5th Cir. 2003). The court of appeals will not generally consider evidence or arguments that were not presented to the district court. *Nissho-Iwai Am. Corp. v. Kline*, 845 F.2d 1300, 1307 (5th Cir. 1988). Plaintiffs may not advance on appeal new theories or raise new issues not properly before the district court to obtain reversal of the summary

judgment. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1071 (5th Cir. 1994)(en banc). The court of appeals will not consider an issue that a party fails to raise in the district court, absent extraordinary circumstances. *North Alamo Water Supply Corp. v. City of San Juan, Tex.*, 90 F.3d 910, 916 (5th Cir. 1996). Extraordinary circumstances exist when the issue involved is a pure question of law and a miscarriage of justice would result from our failure to consider it. *Id.*

III.

A.

Appellant argues, as she did in the district court, that "federal common law authority" should displace Louisiana law's prescriptive periods with federal doctrines of laches and unclean hands to enable claims to recover Nazi-confiscated artworks to be decided on their substantive merits. Appellant asserts that "federal courts displace otherwise applicable state law *whenever* it conflicts with or frustrates important federal interests or policies." No court has ever adopted what Appellant is urging here—some form of special federal limitations period governing all claims involving Nazi-confiscated artwork. In such cases, courts have consistently applied state statutes of limitations. *See, e.g., Orkin v. Taylor*, 487 F.3d 734, 741-42 (9th Cir. 2007); *Von Saher v. Norton Simon Mus. of Art at Pasadena*, 578 F.3d 1016, 1029-30 (9th Cir. 2009); *Detroit Institute of Art v. Ullin*, 2007 WL 1016996, *2 (E.D.Mich. 2007); *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d. 802, 806 (D. Ohio 2006). Further, as this case is brought under federal diversity jurisdiction, the application of state statutory limitations periods is controlled by *Erie*. *Erie R.R. v. Tompkins*, 304 U.S.

64, 78 (1938); *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-09 (1945).

With regard to fashioning federal common law, the Supreme Court has held:

> The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law, nor does the existence of congressional authority under Art. I mean that federal courts are free to develop a common law to govern those areas until Congress acts. Rather, absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.

Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640-41, 101 S. Ct. 2061, 2067 (1981). Here, no Act of Congress has articulated "rights and obligations of the United States" in regard to these claims; even the HVRA creates no individual cause of action. *Orkin*, 487 F.3d at 739. Where Congress has not acted, federal courts' power to displace state law with federal common law is severely con-

strained. Further, no interstate or international disputes are implicated in this controversy that require creation of a uniform federal rule of law. There is in sum no basis to lay out any federal common law to replace Louisiana's prescriptive periods.

B.

For the first time on appeal, Seger-Thomschitz contends that the application of Louisiana's prescriptive laws conflicts with and must be preempted by U.S. foreign policy, most recently articulated in the Terezin Declaration.[1] The preemption theory she now raises is unrelated to the argument for invoking federal common law. Although federal preemption is a legal issue, Appellant has not met the burden of establishing extraordinary circumstances to justify consideration of a new legal theory for the first time on appeal. *See North Alamo Water, supra.*

Appellant argues that she could not have cited the Terezin Declaration to the district court because it was issued just a few days before the district court's ruling. That the Terezin Declaration was promulgated contemporaneously with the district court's order would not have prevented Appellant from citing the Declaration to the court after it ruled. But more important, the Terezin Declaration is not crucial to the Appellant's preemption argu-

---

[1] The Terezin Declaration is a "legally non-binding" document promulgated on June 30, 2009, at the Prague Holocaust Era Assets Conference organized by the Czech Republic. Forty-six states, including the United States, approved of the document. The Terezin Declaration recommends that participating countries implement national programs to address real property confiscated by Nazis, Fascists, and their collaborators and the development of "non-binding guidelines and best practices for restitution and compensation of wrongfully seized immovable property."

ment. It is a "nonbinding executive agreement" that is representative of what Appellant argues to be the preemptive scope of longstanding U.S. foreign policy. Appellant thus could have easily raised the preemption theory to the district court based upon the historical antecedents of the Terezin Declaration, which she avers date back to 1998.[2] Appellant offered no compelling reason why she failed to present this theory to the district court nor does it appear that a miscarriage of justice will result from our failure to address it. We are unpersuaded that this novel theory should be explored for the first time on appeal.

C.

Even if we were to consider Appellant's preemption theory, it is untenable. Appellant relies principally on *American Insurance Association v. Garamendi*, 539 U.S. 396, 123 S. Ct. 2374 (2003), to support the argument that the Terezin Declaration should preempt the Louisiana prescriptive periods. In *Garamendi*, California enacted the Holocaust Victim Insurance Relief Act, which required any insurer that did business in California and that sold insurance policies to Europe during the Holocaust era to disclose certain information about those policies to the California State Insurance Commissioner or risk losing its license. The Supreme Court held the California law was preempted by the implied dormant foreign affairs power of the

---

[2] Appellant's own evidence on appeal notes that the "Terezin Declaration reinforces the Washington Principles." The Washington Conference Principles on Nazi-Confiscated Art were promulgated in 1998 as part of the Washington Conference on Holocaust-Era Assets. Forty-four nations, including the United States, approved these "non-binding principles."

President. *Id.* at 423-24, 123 S. Ct. at 2391-92. The opinion noted that "resolving Holocaust-era insurance claims that may be held by residents of this country is a matter well within the Executive's responsibility for foreign affairs." *Id.* at 420, 123 S. Ct. at 2390. Federal preemption prevented the state from pursuing a more aggressive policy than the President's foreign policy, as expressed by executive agreements with other nations and statements by high-level executive officials. *Id.* at 421-22, 427, 123 S. Ct. at 2390, 2393 ("California seeks to use an iron fist where the President has consistently chosen kid gloves."). Significantly, *Garamendi* found preemption while acknowledging the absence of either an express federal preemption clause or a direct conflict between California and federal law. *Garamendi* noted, however, that where a state has acted within "its traditional competence, but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or traditional importance of the state concern asserted." *Id.* at 420 n.11, 123 S. Ct. at 2390.

Seger-Thomschitz argues that to apply Louisiana's prescriptive laws would unconstitutionally intrude on the President's authority to conduct foreign affairs. The policy represented by the Terezin Declaration should preempt Louisiana prescription periods because it expresses a preference to adjudicate claims for recovery of Nazi-confiscated artworks on their facts and merits. As additional support, Appellant cites statements by various executive branch officials expressing concern that such claims were not being adjudicated on the merits but were barred by statutes of limitations and other defenses.

There are key distinctions between this case and *Garamendi*. In *Garamendi*, California was essentially pursuing independent policy objectives in favor of Holocaust victims. The existence of its law limited the President's ability to exercise his preeminent foreign affairs authority. In this case, Louisiana has not pursued any policy specific to Holocaust victims or Nazi-confiscated artwork. The state's prescription periods apply generally to any challenge of ownership to movable property. La. Civ. Code art. 3544 (1870); La. Civ. Code art. 3506 (1870). Louisiana's laws are well within the realm of traditional state responsibilities. In exercising its strong interest in regulating the ownership of property within the state through these prescriptive laws, Louisiana has not infringed on any exclusive federal powers. Indeed, the Terezin Declaration itself contains language noting that "different legal traditions" should be taken into account. Appellant presents no proof that U.S. policy on behalf of Holocaust victims is committed to overriding generally applicable state property law. The type of preemption established by *Garamendi* is thus inapplicable; Louisiana's prescriptive laws are not preempted by the Terezin Declaration, U.S. foreign policy, or the President's foreign affairs powers.

IV.

For these reasons, we affirm the judgment of the district court. is **AFFIRMED**.

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-30717

SARAH BLODGETT DUNBAR,
Plaintiff – Appellee
v.
CLAUDIA SEGER-THOMSCHITZ, Doctor,
Defendant – Appellant

Appeals from the
United States District Court for the
Eastern District of Louisiana, New Orleans

ON PETITIONS FOR
REHEARING EN BANC

(Opinion 8/20/2010, 5 Cir., _____, _____, F.3d _____)

Before JONES, Chief Judge, and
KING, and HAYNES, Circuit Judges.

PER CURIAM:

(x) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

( ) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:
s/Edith H. Jones
United States Circuit Judge

REHG17A

United States Constitution
Article VI, Clause 2

Article VI, Clause 2 of the United States Constitution prescribes as follows:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary Notwithstanding."

U.S. Department of State
Diplomacy in Action

Prague Holocaust Era Assets Conference: *Terezin Declaration*

BUREAU OF EUROPEAN AND
EURASIAN AFFAIRS
June 30, 2009

Upon the invitation of the Prime Minister of the Czech Republic we the representatives of 46 states listed below met this day, June 30, 2009 in Terezin, where thousands of European Jews and other victims of Nazi persecution died or were sent to death camps during World War II. We participated in the Prague Holocaust Era Assets Conference organized by the Czech Republic and its partners in Prague and Terezin from 26-30 June 2009, discussed together with experts and non-governmental organization (NGO) representatives important issues such as Welfare of Holocaust (Shoah) Survivors and other Victims of Nazi Persecution, Immovable Property, Jewish Cemeteries and Burial Sites, Nazi- Confiscated and Looted Art, Judaica and Jewish Cultural Property, Archival Materials, and Education, Remembrance, Research and Memorial Sites. We join affirming in this

Terezin Declaration on Holocaust Era Assets and Related issues

- Aware that Holocaust (Shoah) survivors and other victims of Nazi persecution have reached an advanced age and that it is imperative to respect their personal dignity and to deal with their social welfare needs, as an issue of utmost urgency,

- Having in mind the need to enshrine for the benefit of future generations and to remember forever the unique history and the legacy of the Holocaust (Shoah), which exterminated three fourths of European Jewry, including its premeditated nature as well as other Nazi crimes,
- Noting the tangible achievements of the 1997 London Nazi Gold Conference, and the 1998 Washington Conference on Holocaust-Era Assets, which addressed central issues relating to restitution and successfully set the stage for the significant advances of the next decade, as well as noting the January 2000 Stockholm Declaration, the October 2000 Vilnius Conference on Holocaust Era Looted Cultural Assets,
- Recognizing that despite those achievements there remain substantial issues to be addressed, because only a part of the confiscated property has been recovered or compensated,
- Taking note of the deliberations of the Working Groups and the Special Session on Social Welfare of Holocaust Survivors and their points of view and opinions which surveyed and addressed issues relating to the Social Welfare of Holocaust Survivors and other Victims of Nazi Persecution, Immovable Property, Nazi Confiscated Art, Judaica and Jewish Cultural Property, Holocaust Education, Remembrance and Research, which can be found on the weblink for the Prague Conference and will be published in the Conference Proceedings,
- Keeping in mind the legally non-binding nature of this Declaration and moral responsibilities thereof, and without prejudice to applicable international law and obligations,
1. Recognizing that Holocaust (Shoah) survivors and other victims of the Nazi regime and its collaborators

suffered unprecedented physical and emotional trauma during their ordeal, the Participating States take note of the special social and medical needs of all survivors and strongly support both public and private efforts in their respective states to enable them to live in dignity with the necessary basic care that it implies.

2. Noting the importance of restituting communal and individual immovable property that belonged to the victims of the Holocaust (Shoah) and other victims of Nazi persecution, the Participating States urge that every effort be made to rectify the consequences of wrongful property seizures, such as confiscations, forced sales and sales under duress of property, which were part of the persecution of these innocent people and groups, the vast majority of whom died heirless.

3. Recognizing the progress that has been made in research, identification, and restitution of cultural property by governmental and non-governmental institutions in some states since the 1998 Washington Conference on Holocaust-Era Assets and the endorsement of the Washington Conference Principles on Nazi-Confiscated Art, the Participating States affirm an urgent need to strengthen and sustain these efforts in order to ensure just and fair solutions regarding cultural property, including Judaica that was looted or displaced during or as a result of the Holocaust (Shoah).

4. Taking into account the essential role of national governments, the Holocaust (Shoah) survivors' organizations, and other specialized NGOs, the Participating States call for a coherent and more effective approach by States and the international community to ensure the fullest possible, relevant archival access with due respect to national

legislation. We also encourage States and the international community to establish and support research and education programs about the Holocaust (Shoah) and other Nazi crimes, ceremonies of remembrance and commemoration, and the preservation of memorials in former concentration camps, cemeteries and mass graves, as well as of other sites of memory.

5. Recognizing the rise of Anti-Semitism and Holocaust (Shoah) denial, the Participating States call on the international community to be stronger in monitoring and responding to such incidents and to develop measures to combat anti-Semitism.

The Welfare of Holocaust (Shoah) Survivors and other Victims of Nazi Persecution

Recognizing that Holocaust (Shoah) survivors and other victims of Nazi persecution, including those who experienced the horrors of the Holocaust (Shoah) as small and helpless children, suffered unprecedented physical and emotional trauma during their ordeal.

Mindful that scientific studies document that these experiences frequently result in heightened damage to health, particularly in old age, we place great priority on dealing with their social welfare needs in their lifetimes. It is unacceptable that those who suffered so greatly during the earlier part of their lives should live under impoverished circumstances at the end.

1. We take note of the fact that Holocaust (Shoah) survivors and other victims of Nazi persecution have today reached an advanced age and that they have special medical and health needs, and we therefore support, as a high priority, efforts to address in their

respective states the social welfare needs of the most vulnerable elderly victims of Nazi persecution – such as hunger relief, medicine and homecare as required, as well as measures that will encourage intergenerational contact and allow them to overcome their social isolation. These steps will enable them to live in dignity in the years to come. We strongly encourage cooperation on these issues.

2. We further take note that several states have used a variety of creative mechanisms to provide assistance to needy Holocaust (Shoah) survivors and other victims of Nazi persecution, including special pensions; social security benefits to non-residents; special funds; and the use of assets from heirless property. We encourage states to consider these and other alternative national actions, and we further encourage them to find ways to address survivors' needs.

Immovable (Real) Property

Noting that the protection of property rights is an essential component of a democratic society and the rule of law,

Acknowledging the immeasurable damage sustained by individuals and Jewish communities as a result of wrongful property seizures during the Holocaust (Shoah),

Recognizing the importance of restituting or compensating Holocaust-related confiscations made during the Holocaust era between 1933-45 and as its immediate consequence,

Noting the importance of recovering communal and religious immovable property in reviving and enhancing Jewish life, ensuring its future, assisting the welfare needs of Holocaust (Shoah) survivors,

and fostering the preservation of Jewish cultural heritage,

1. We urge, where it has not yet been effectively achieved, to make every effort to provide for the restitution of former Jewish communal and religious property by either in rem restitution or compensation, as may be appropriate; and

2. We consider it important, where it has not yet been effectively achieved, to address the private property claims of Holocaust (Shoah) victims concerning immovable (real) property of former owners, heirs or successors, by either in rem restitution or compensation, as may be appropriate, in a fair, comprehensive and nondiscriminatory manner consistent with relevant national law and regulations, as well as international agreements. The process of such restitution or compensation should be expeditious, simple, accessible, transparent, and neither burdensome nor costly to the individual claimant; and we note other positive legislation in this area.

3. We note that in some states heirless property could serve as a basis for addressing the material necessities of needy Holocaust (Shoah) survivors and to ensure ongoing education about the Holocaust (Shoah), its causes and consequences.

4. We recommend, where it has not been done, that states participating in the Prague Conference consider implementing national programs to address immovable (real) property confiscated by Nazis, Fascists and their collaborators. If and when established by the Czech Government, the European Shoah Legacy Institute in Terezin shall facilitate an intergovernmental effort to develop non-binding guidelines and best practices for restitution and compensation of wrongfully seized immovable

property to be issued by the one-year anniversary of the Prague Conference, and no later than June 30, 2010, with due regard for relevant national laws and regulations as well as international agreements, and noting other positive legislation in this area.

Jewish Cemeteries and Burial Sites

Recognizing that the mass destruction perpetrated during the Holocaust (Shoah) put an end to centuries of Jewish life and included the extermination of thousands of Jewish communities in much of Europe, leaving the graves and cemeteries of generations of Jewish families and communities unattended, and

Aware that the genocide of the Jewish people left the human remains of hundreds of thousands of murdered Jewish victims in unmarked mass graves scattered throughout Central and Eastern Europe,

We urge governmental authorities and municipalities as well as civil society and competent institutions to ensure that these mass graves are identified and protected and that the Jewish cemeteries are demarcated, preserved and kept free from desecration, and where appropriate under national legislation could consider declaring these as national monuments.

Nazi-Confiscated and Looted Art

Recognizing that art and cultural property of victims of the Holocaust (Shoah) and other victims of Nazi persecution was confiscated, sequestered and spoliated, by the Nazis, the Fascists and their collaborators through various means including theft, coercion and confiscation, and on grounds of

relinquishment as well as forced sales and sales under duress, during the Holocaust era between 1933-45 and as an immediate consequence, and

Recalling the Washington Conference Principles on Nazi-Confiscated Art as endorsed at the Washington Conference of 1998, which enumerated a set of voluntary commitments for governments that were based upon the moral principle that art and cultural property confiscated by the Nazis from Holocaust (Shoah) victims should be returned to them or their heirs, in a manner consistent with national laws and regulations as well as international obligations, in order to achieve just and fair solutions,

1. We reaffirm our support of the Washington Conference Principles on Nazi-Confiscated Art and we encourage all parties including public and private institutions and individuals to apply them as well,

2. In particular, recognizing that restitution cannot be accomplished without knowledge of potentially looted art and cultural property, we stress the importance for all stakeholders to continue and support intensified systematic provenance research, with due regard to legislation, in both public and private archives, and where relevant to make the results of this research, including ongoing updates, available via the internet, with due regard to privacy rules and regulations. Where it has not already been done, we also recommend the establishment of mechanisms to assist claimants and others in their efforts,

3. Keeping in mind the Washington Conference Principles on Nazi-Confiscated Art, and considering the experience acquired since the Washington Conference, we urge all stakeholders to ensure that their legal systems or alternative processes, while taking into account the different legal traditions,

facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties. Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under law.

Judaica and Jewish Cultural Property

Recognizing that the Holocaust (Shoah) also resulted in the wholesale looting of Judaica and Jewish cultural property including sacred scrolls, synagogue and ceremonial objects as well as the libraries, manuscripts, archives and records of Jewish communities, and

Aware that the murder of six million Jews, including entire communities, during the Holocaust (Shoah) meant that much of this historical patrimony could not be reclaimed after World War II, and

Recognizing the urgent need to identify ways to achieve a just and fair solution to the issue of Judaica and Jewish cultural property, where original owners, or heirs of former original Jewish owners, individuals or legal persons cannot be identified, while acknowledging there is no universal model,

1. We encourage and support efforts to identify and catalogue these items which may be found in archives, libraries, museums and other government and non-government repositories, to return them to their original rightful owners and other appropriate individuals or institutions according to national law,

and to consider a voluntary international registration of Torah scrolls and other Judaica objects where appropriate, and

2. We encourage measures that will ensure their protection, will make appropriate materials available to scholars, and where appropriate and possible in terms of conservation, will restore sacred scrolls and ceremonial objects currently in government hands to synagogue use, where needed, and will facilitate the circulation and display of such Judaica internationally by adequate and agreed upon solutions.

Archival Materials

Whereas access to archival documents for both claimants and scholars is an essential element for resolving questions of the ownership of Holocaust-era assets and for advancing education and research on the Holocaust (Shoah) and other Nazi crimes,

Acknowledging in particular that more and more archives have become accessible to researchers and the general public, as witnessed by the Agreement reached on the archives of the International Tracing Service (ITS) in Bad Arolsen, Germany,

Welcoming the return of archives to the states from whose territory they were removed during or as an immediate consequence of the Holocaust (Shoah),

We encourage governments and other bodies that maintain or oversee relevant archives to make them available to the fullest extent possible to the public and researchers in accordance with the guidelines of the International Council on Archives, with due regard to national legislation, including provisions on privacy and data protection, while also taking into account the special circumstances created by the

Holocaust era and the needs of the survivors and their families, especially in cases concerning documents that have their origin in Nazi rules and laws.

Education, Remembrance, Research and Memorial Sites

Acknowledging the importance of education and remembrance about the Holocaust (Shoah) and other Nazi crimes as an eternal lesson for all humanity,
Recognizing the preeminence of the Stockholm Declaration on Holocaust Education, Remembrance and Research of January 2000,
Recognizing that the Universal Declaration of Human Rights was drafted in significant part in the realization of the horrors that took place during the Holocaust, and further recognizing the U.N. Convention on the Prevention and Punishment of the Crime of Genocide,
Recalling the action of the United Nations and of other international and national bodies in establishing an annual day of Holocaust remembrance,
Saluting the work of the Task Force for International Cooperation on Holocaust Education, Remembrance and Research (ITF) as it marks its tenth anniversary, and encouraging the States participating in the Prague Conference to cooperate closely with the Task Force, and
Repudiating any denial of the Holocaust (Shoah) and combating its trivialization or diminishment, while encouraging public opinion leaders to stand up against such denial, trivialization or diminishment,
1. We strongly encourage all states to support or establish regular, annual ceremonies of remem-

brance and commemoration, and to preserve memorials and other sites of memory and martyrdom. We consider it important to include all individuals and all nations who were victims of the Nazi regime in a worthy commemoration of their respective fates,

2. We encourage all states as a matter of priority to include education about the Holocaust (Shoah) and other Nazi crimes in the curriculum of their public education systems and to provide funding for the training of teachers and the development or procurement of the resources and materials required for such education.

3. Believing strongly that international human rights law reflects important lessons from history, and that the understanding of human rights is essential for confronting and preventing all forms of racial, religious or ethnic discrimination, including Anti-Semitism, and Anti-Romani sentiment, today we are committed to including human rights education into the curricula of our educational systems. States may wish to consider using a variety of additional means to support such education, including heirless property where appropriate.

4. As the era is approaching when eye witnesses of the Holocaust (Shoah) will no longer be with us and when the sites of former Nazi concentration and extermination camps, will be the most important and undeniable evidence of the tragedy of the Holocaust (Shoah), the significance and integrity of these sites including all their movable and immovable remnants, will constitute a fundamental value regarding all the actions concerning these sites, and will become especially important for our civilization including, in particular, the education of future generations. We, therefore, appeal for broad

support of all conservation efforts in order to save those remnants as the testimony of the crimes committed there to the memory and warning for the generations to come and where appropriate to consider declaring these as national monuments under national legislation.

Future Action

Further to these ends we welcome and are grateful for the Czech Government's initiative to establish the European Shoah Legacy Institute in Terezin (Terezin Institute) to follow up on the work of the Prague Conference and the Terezin Declaration. The Institute will serve as a voluntary forum for countries, organisations representing Holocaust (Shoah) survivors and other Nazi victims, and NGOs to note and promote developments in the areas covered by the Conference and this Declaration, and to develop and share best practices and guidelines in these areas and as indicated in paragraph four of Immovable (Real) Property. It will operate within the network of other national, European and international institutions, ensuring that duplicative efforts are avoided, for example, duplication of the activities of the Task Force for International Cooperation on Holocaust Education, Remembrance and Research (ITF).

Following the conference proceedings and the Terezin Declaration, the European Commission and the Czech Presidency have noted the importance of the Institute as one of the instruments in the fight against racism, xenophobia and anti-Semitism in Europe and the rest of the world, and have called for other countries and institutions to support and cooperate with this Institute.

To facilitate the dissemination of information, the Institute will publish regular reports on activities related to the Terezin Declaration. The Institute will develop websites to facilitate sharing of information, particularly in the fields of art provenance, immovable property, social welfare needs of survivors, Judaica, and Holocaust education. As a useful service for all users, the Institute will maintain and post lists of websites that Participating States, organizations representing Holocaust (Shoah) survivors and other Nazi victims and NGOs sponsor as well as a website of websites on Holocaust issues.

We also urge the States participating in the Prague Conference to promote and disseminate the principles in the Terezin Declaration, and encourage those states that are members of agencies, organizations and other entities which address educational, cultural and social issues around the world, to help disseminate information about resolutions and principles dealing with the areas covered by the Terezin Declaration.

A more complete description of the Czech Government's concept for the Terezin Institute and the Joint Declaration of the European Commission and the Czech EU Presidency can be found on the website for the Prague Conference and will be published in the conference proceedings.

List of States

1. Albania
2. Argentina
3. Australia
4. Austria
5. Belarus
6. Belgium

7. Bosnia and Herzegovina
8. Brazil
9. Bulgaria
10. Canada
11. Croatia
12. Cyprus
13. Czech Republic
14. Denmark
15. Estonia
16. Finland
17. France
18. FYROM
19. Germany
20. Greece
21. Hungary
22. Ireland
23. Israel
24. Italy
25. Latvia
26. Lithuania
27. Luxembourg
28. Malta
29. Moldova
30. Montenegro
31. The Netherlands
32. Norway
33. Poland
34. Portugal
35. Romania
36. Russia
37. Slovakia
38. Slovenia
39. Spain
40. Sweden
41. Switzerland
42. Turkey

43. Ukraine
44. United Kingdom
45. United States
46. Uruguay

The Holy See *(observer)*
Serbia *(observer)*

Washington Conference Principles On Nazi-Confiscated Art

Released in connection with the Washington Conference on Holocaust-Era Assets, Washington, DC, December 3, 1998

In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.

I. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.

II. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.

III. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.

IV. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.

V. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.

VI. Efforts should be made to establish a central registry of such information.

VII. Pre-War owners and their heirs should be encouraged to come forward and make known their

claims to art that was confiscated by the Nazis and not subsequently restituted.

VIII. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.

IX. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, can not be identified, steps should be taken expeditiously to achieve a just and fair solution.

X. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.

XI. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.

Public Law 105-158
105th Congress

An Act

To provide redress for inadequate restitution of assets seized by the United States Government during World War II which belonged to victims of the Holocaust, and for other purposes. (Feb. 13, 1998/[S. 1564])

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, [Holocaust Victims Redress Act]

SECTION 1. SHORT TITLE.

This Act may be cited as the "Holocaust Victims Redress Act".

TITLE I—HEIRLESS ASSETS

SEC. 101. FINDINGS AND PURPOSES.

(a) FINDINGS.—The Congress finds as follows:

(1) Among the $198,000,000 in German assets located in the United States and seized by the United States Government in World War II were believed to be bank accounts, trusts, securities, or other assets belonging to Jewish victims of the Holocaust.

(2) Among an estimated $1,200,000,000 in assets of Swiss nationals and institutions which were frozen by the United States Government during World War II (including over $400,000,000 in bank deposits) were assets

whose beneficial owners were believed to include victims of the Holocaust.

(3) In the aftermath of the war, the Congress recognized that some of the victims of the Holocaust whose assets were among those seized or frozen during the war might not have any legal heirs, and legislation was enacted to authorize the transfer of up to $3,000,000 of such assets to organizations dedicated to providing relief and rehabilitation for survivors of the Holocaust.

(4) Although the Congress and the Administration authorized the transfer of such amount to the relief organizations referred to in paragraph (3), the enormous administrative difficulties and cost involved in proving legal ownership of such assets, directly or beneficially, by victims of the Holocaust, and proving the existence or absence of heirs of such victims, led the Congress in 1962 to agree to a lump-sum settlement and to provide $500,000 for the Jewish Restitution Successor Organization of New York, such sum amounting to 1/6th of the authorized maximum level of "heirless" assets to be transferred.

(5) In June of 1997, a representative of the Secretary of State, in testimony before the Congress, urged the reconsideration of the limited $500,000 settlement.

(6) While a precisely accurate accounting of "heirless" assets may be impossible, good conscience warrants the recognition that the victims of the Holocaust have a compelling moral claim to the unrestituted portion of assets referred to in paragraph (3).

(7) Furthermore, leadership by the United States in meeting obligations to Holocaust victims would strengthen —

(A) the efforts of the United States to press for the speedy distribution of the remaining nearly 6 metric tons of gold still held by the Tripartite Commission for the Restitution of Monetary Gold (the body established by France, Great Britain, and the United States at the end of World War II to return gold looted by Nazi Germany to the central banks of countries occupied by Germany during the war); and

(B) the appeals by the United States to the 15 nations claiming a portion of such gold to contribute a substantial portion of any such distribution to Holocaust survivors in recognition of the recently documented fact that the gold held by the Commission includes gold stolen from individual victims of the Holocaust.

(b) PURPOSES.—The purposes of this Act are as follows:

(1) To provide a measure of justice to survivors of the Holocaust all around the world while they are still alive.

(2) To authorize the appropriation of an amount which is at least equal to the present value of the difference between the amount which was authorized to be transferred to successor organizations to compensate for assets in the United States of heirless victims of the Holocaust and the amount actually paid in 1962 to the Jewish Restitution Successor Organization of New York for that purpose.

(3) To facilitate efforts by the United States to seek an agreement whereby nations with claims against gold held by the Tripartite Commission for the Restitution of Monetary Gold would contribute all, or a substantial portion, of that gold to charitable organizations to assist survivors of the Holocaust.

SEC. 102. DISTRIBUTIONS BY THE TRIPARTITE GOLD COMMISSION.

(a) DIRECTIONS TO THE PRESIDENT.—The President shall direct the commissioner representing the United States on the Tripartite Commission for the Restitution of Monetary Gold, established pursuant to Part III of the Paris Agreement on Reparation, to seek and vote for a timely agreement under which all signatories to the Paris Agreement on Reparation, with claims against the monetary gold pool in the jurisdiction of such Commission, contribute all, or a substantial portion, of such gold to charitable organizations to assist survivors of the Holocaust.

(b) AUTHORITY TO OBLIGATE THE UNITED STATES.—

(1) IN GENERAL—From funds otherwise unobligated in the Treasury of the United States, the President is authorized to obligate subject to paragraph (2) an amount not to exceed $30,000,000 for distribution in accordance with subsections (a) and (b).

(2) CONFORMANCE WITH BUDGET ACT REQUIREMENT.—Any budget authority contained in paragraph (1) shall be effective only to such extent and in such amounts as are provided in advance in appropriation Acts.

SEC. 103. FULFILLMENT OF OBLIGATION OF THE UNITED STATES.

(a) AUTHORIZATION OF APPROPRIATIONS.— There are authorized to be appropriated to the President such sums as may be necessary for fiscal years 1998, 1999, and 2000, not to exceed a total of $25,000,000 for all such fiscal years, for distribution to organizations as may be specified in any agreement concluded pursuant to section 102.

(b) ARCHIVAL RESEARCH.—There are authorized to be appropriated to the President $5,000,000 for archival research and translation services to assist in the restitution of assets looted or extorted from victims of the Holocaust and such other activities that would further Holocaust remembrance and education.

TITLE II—WORKS OF ART

SEC. 201. FINDINGS.

Congress finds as follows:

(1) Established pre-World War II principles of international law, as enunciated in Articles 47 and 56 of the Regulations annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, prohibited pillage and the seizure of works of art.

(2) In the years since World War II, international sanctions against confiscation of works of art have been amplified through such conventions as the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which forbids the illegal export of art work and calls for its earliest possible restitution to its rightful owner.

(3) In defiance of the 1907 Hague Convention, the Nazis extorted and looted art from individuals and institutions in countries it occupied during World War II and used such booty to help finance their war of aggression.

(4) The Nazis' policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish and other religious and cultural heritage and, in this context, the Holocaust, while standing as a civil war against defined individuals and civilized values, must be considered a fundamental aspect of the world war unleashed on the continent.

(5) Hence, the same international legal principles applied among states should be applied to art and other assets stolen from victims of the Holocaust.

(6) In the aftermath of the war, art and other assets were transferred from territory previously controlled by the Nazis to the Union of Soviet Socialist Republics, much of which has not been returned to rightful owners.

SEC. 202. SENSE OF THE CONGRESS REGARDING RESTITUTION OF PRIVATE PROPERTY, SUCH AS WORKS OF ART.

It is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.

Approved February 13, 1998.

LEGISLATIVE HISTORY—S. 1564:
CONGRESSIONAL RECORD:

Vol. 143 (1997): Nov. 13, considered and passed Senate.

Vol. 144 (1998): Jan. 27, considered and passed House.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 34 (1998):

Feb. 13, Presidential statement.

28 U.S.C.A. § 2106

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part V. Procedure
Chapter 133. Review--Miscellaneous Provisions (Refs & Alms)
§ 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

CREDIT(S)
(June 25, 1948, c. 646, 62 Stat. 963.)

HISTORICAL AND STATUTORY NOTES
Revision Notes and Legislative Reports
1948 Acts. Based on Title 28, U.S.C., 1940 ed., §§ 344, 876, 877 (R.S. § 701; Mar. 3, 1891, c. 517, §§ 10, 11, 26 Stat. 829; Mar. 3, 1911, c. 231, §§ 236, 237, 291, 36 Stat. 1156, 1167; Dec. 23, 1914, c. 2, 38 Stat. 790; Sept. 16, 1916, c. 448, § 2, 39 Stat. 726; Feb. 17, 1922, c. 54, 42 Stat. 366; Feb. 13, 1925, c. 229, § 1, 43 Stat. 937; Jan. 31, 1928, c. 14, § 1, 45 Stat. 54).

LSA-C.C. Art. 3421

West's Louisiana Statutes Annotated Currentness
Louisiana Civil Code
Book III. Of the Different Modes of Acquiring the Ownership of Things (Refs & Annos)
Title XXIII. Occupancy and Possession (Refs & Annos)
Chapter 2. Possession
Section 1. Notion and Kinds of Possession
Art. 3421. Possession

Possession is the detention or enjoyment of a corporeal thing, movable or immovable, that one holds or exercises by himself or by another who keeps or exercises it in his name.

The exercise of a real right, such as a servitude, with the intent to have it as one's own is quasi-possession. The rules governing possession apply by analogy to the quasi-possession of incorporeals.

CREDIT(S)
Acts 1982, No. 187, § 1, eff. Jan. 1, 1983.

LSA-C.C. Art. 3488

West's Louisiana Statutes Annotated Currentness
Louisiana Civil Code
Book III. Of the Different Modes of Acquiring the Ownership of Things (Refs & Annos)
Title XXIV. Prescription (Refs & Annos)
Chapter 3. Acquisitive Prescription
Section 2. Immovables: Prescription of Thirty Years
Art. 3488. Applicability of rules governing prescription of ten years

The rules governing acquisitive prescription of ten years apply to the prescription of thirty years to the extent that their application is compatible with the prescription of thirty years.

CREDIT(S)
Acts 1982, No. 187, § 1, eff. Jan. 1, 1983.
LA C.C. Bk. III, T. XXIII, Refs & Annos
LA C.C. Bk. III, T. XXIII, Disp Table

LSA-C.C. Art. 3491

West's Louisiana Statutes Annotated Currentness
Louisiana Civil Code
Book III. Of the Different Modes of Acquiring the Ownership of Things (Refs & Annos)
Title XXIV. Prescription (Refs & Annos)
Chapter 3. Acquisitive Prescription
Section 3. Movables: Acquisitive Prescription of Three Years or Ten Years
Art. 3491. Prescription of ten years

One who has possessed a movable as owner for ten years acquires ownership by prescription. Neither title nor good faith is required for this prescription.

CREDIT(S)
Acts 1982, No. 187, § 1, eff. Jan. 1, 1983.
LA C.C. Bk. III, T. XXIII, Refs & Annos
LA C.C. Bk. III, T. XXIII, Disp Table

LSA-C.C. Art. 3506

West's Louisiana Statutes Annotated Currentness
Louisiana Civil Code
Book III Of the Different Modes of Acquiring the Ownership of Things (Refs & Annos)
Title XXV. Of the Signification of Sundry Terms of Law Employed in This Code (Refs & Annos)
Art. 3506. General definitions of terms

Whenever the terms of law, employed in this Code, have not been particularly defined therein, they shall be understood as follows:
1. The masculine gender comprehends the two sexes, whenever the provision is not one, which is evidently made for one of them only:
Thus, the word *man* or *men* includes women; the word *son* or *sons* includes daughters: the words *he*, *his* and such like, are applicable to both males and females.
2. The singular is often employed to designate several persons or things: the *heir*, for example, means the heirs, where there are more than one.
3. Abandoned:--In the context of a father or mother abandoning his child, abandonment is presumed when the father or mother has left his child for a period of at least twelve months and the father or mother has failed to provide for the child's care and support, without just cause, thus demonstrating an intention to permanently avoid parental responsibility.
4. Repealed by Acts 1999, No, 503, § 1.
5. Assigns.--Assigns means those to whom rights have been transmitted by particular title; such as sale, donation, legacy, transfer or cession.
6. Repealed by Acts 1999, No. 503, § 1.

7. Repealed by Acts 1999. No. 503, § 1.

8. Children. Under this name are included those persons born of the marriage, those adopted, and those whose filiation to the parent has been established in the manner provided by law, as well as descendants of them in the direct line.

A child born of marriage is a child conceived or born during the marriage of his parents or adopted by them.

A child born outside of marriage is a child conceived and born outside of the marriage of his parents.

9 to 11. Repealed by Acts 1999. No. 503 § 1.

12. Family.--Family in a limited sense, signifies father, mother, and children. In a more extensive sense, it comprehends all the individuals who live under the authority of another, and includes the servants of the family.

It is also employed to signify all the relations who descend from a common root.

13 to 22. Repealed by Acts 1999. No. 503, § 1.

23. Repealed by Acts 1987, No. 125, § 2, eft Jan. 1, 1988.

24 to 27. Repealed by Acts 1999, No. 503, § 1.

28. Successor.--Successor is, generally speaking, the person who takes the place of another.

There are in law two sorts of successors: the universal successor, such as the heir, the universal legatee, and the general legatee; and the successor by particular title, such as the buyer, donee or legatee of particular things, the transferee.

The universal successor represents the person of the deceased, and succeeds to all his rights and charges.

The particular successor succeeds only to the rights appertaining to the thing which is sold, ceded or bequeathed to him.

29 to 31. Repealed by Acts 1999, No. 503, § 1.

32. Third Persons.--With respect to a contract or judgment, third persons are all who are not parties to it. In case of failure, third persons are, particularly, those creditors of the debtor who contracted with him without knowledge of the rights which he had transferred to another.

CREDIT(S)

Amended by Acts 1979, No. 607, § 1; Acts 1979, No. 711, § 1, eff. Jan. 1, 1980; Acts 1981, No. 919, § 2, eff.

West's Louisiana Statutes Annotated Currentness
Louisiana Civil Code
Book IV. Conflict of Laws (Refs & Annos)
Title VII. Delictual and Quasi-Delictual Obligations (Refs & Annos)

Art. 3544. Issues of loss distribution and financial protection

Issues pertaining to loss distribution and financial protection are governed, as between a person injured by an offense or quasi-offense and the person who caused the injury, by the law designated in the following order:

(1) If, at the time of the injury, the injured person and the person who caused the injury were domiciled in the same state, by the law of that state. Persons domiciled in states whose law on the particular issue is substantially identical shall be treated as if domiciled in the same state.

(2) If, at the time of the injury, the injured person and the person who caused the injury were domiciled in different states: (a) when both the injury and the conduct that caused it occurred in one of those states, by the law of that state; and (b) when the injury and the conduct that caused it occurred in different states, by the law of the state in which the injury occurred, provided that (i) the injured person was domiciled in that state, (ii) the person who caused the injury should have foreseen its occurrence in that state, and (iii) the law of that state provided for a higher standard of financial protection for the injured person than did the law of the state in which the injurious conduct occurred.

CREDIT(S)
Acts 1991, No. 923, § 1, eff. Jan. 1, 1992.

KUNSTHAUS ZÜRICH

Mr.
Thomas J. Hamilton
Byrne Goldenberg & Hamilton PLLC
1025 Connecticut Avenue NW, Suite 1012
Washington
USA DC 20034

Dr. Claudia Seger-Thomschitz
Zurich. Oktober 19th, 2010

Dear Mr. Hamilton,
I am coming back to you concerning the claim of restitution for a painting by Oskar Kokoschka, sold by Oskar Reichel to Otto Kallir in 1939, as expressed in your letter of April 12th, 2007.

First I like to express our apologies that it took such a long time to reach the necessary state of knowledge to understand this sale and to give you the right answer. We soon realized, thanks to your rich documentation, that this painting, a portrait of Helene Kann, was one of a group of paintings by Kokoschka, Reichel purchased already in the Tens probably from the artist and which he tried to sell in the Twenties and Thirties and of which the "Lovers", now in the Museum of Fine Art in Boston, is by far the most important. We got in touch with the colleagues there and we learnt that their highly professional researchers were scrutinizing the case, making the necessary investigations, partly in collaboration with the Galerie St. Etienne, founded by Otto Kallir. As we do not have specialized staff for these questions and as it does not make sense to do

the same work twice, we waited for the results of the scientists in Boston.
Certainly you are completely informed about the outcome of the closer view to the historical circumstances: that in all probability Oskar Reichel liked to sell the paintings well before 1939 and that the sale to the Neue Galerie and to Otto Kallir has been rightfully effectuated and paid. That is why there was no claim by Hans Reichel after the war – contrary to the paintings by Romako, restituted by the Wien Museum in 2004. As these historical facts were not accepted by the claimant, the Museum had to pass the case to the justice. Only last week the US Courts of Appeals confirmed the judgement of May 28, 2009, that the Museum of Fine Arts Boston is the rightful owner of Kokoschka's "Lovers".

As the history of the portrait of Helene Kann corresponds exactly to the "Lovers", this judgement confirms the rightful ownership of this painting by the Ziircher Kunstgesellschaft as well. We would be glad if you or Dr. Seger-Thomschitz could confirm this.

We like to raise a last question: Oskar Reichel married a Miss Kann, I suppose Malvine – was she a sister of Helene Kann's (née Pollak) husband? Perhaps your investigations shed some light in these relationships which might elucidate the origin of the painting and the circle in which Kokoschka formed his crucial first expressionistic style in 1909/10. That the painting could be purchased by the daughter of the sitter in 1953 and be given by her husband in her memory to the Kunsthaus Zurich in 1965 makes much sense and is a happy historical constellation, It is the earliest of our twelve paintings by Kokoschka,

probably the most comprehensive collection in any museum, including his most important anti-Nazi picture "What we are fighting for" [1943], given by the artist to its director Wilhelm Wartmann, as it was only in this museum that his works were shown during the "Dritte Reich".

Looking forward to learn something more about the painting and its sitter from you or from Mrs. Seger-Thomschitz.

Yours sincerely
s/Christian Klemm
Dr. Christian Klemm
Curator of the collections
Deputy Director

Zürcher Kunstgesellschaft
Postfach CH 8024 Zürich.
Tel. +41 (0) 44 253 84 84
Fax. 41 (0) 44 253 84 33
www.kunsthaus.ch
Museum Heimplatz 1
Direktion Winkelwiese 4, CH 8001 Zürich